(24,563)

(24,564)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 352.

ARTHUR B. DUEL APPELLANT,

vs.

HARRY B. HOLLINS ET AL., INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER.

No. 353.

WIENER, LEVY & CO., APPELLANTS,

vs.

HARRY B. HOLLINS ET AL., INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 14, 1916.

1 In the District Court of the United States for the Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. Aull, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins and Company, Alleged Bankrupts.

Petition.

Filed March 2, 1914.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Arthur B. Duel, respectfully shows:

First. On the 13th day of November, 1913, and prior thereto, Harry B. Hollins, Briton N. Busch, John A. Aull, Anthony N. Walburg and Walter Kutzleb were doing business in the City of New York, N. Y., as copartners under the name of H. B. Hollins & Co., and on the 13th day of November, 1913, an involuntary petition was duly filed in the District Court of the United States
2 for the Southern District of New York by creditors of said H. B. Hollins & Co., praying that the said Harry B. Hollins, Briton N. Busch, John A. Aull, Anthony H. Walburg and Walter Kutzleb, individually and as members of the firm of H. B. Hollins & Co., be adjudicated bankrupts, and thereafter A. Leo Everett was duly appointed by said District Court as the Receiver of said alleged bankrupts, and has duly qualified and taken possession of the estate, assets and properties belonging to the said alleged bankrupts or found on their premises or under their control, and is still acting as such Receiver.

Second. On or about the 30th day of October, 1913, your petitioner directed said H. B. Hollins & Co., to purchase, for his account, 100 shares of the capital stock of the Amalgamated Copper Company, which shares are of the par value of $100 each. On said 30th day of October, 1913, said H. B. Hollins & Co., purchased for the account of your petitioner, 100 shares of the capital stock of the Amalgamated Copper Company, and, on said date, notified your petitioner in writing of said purchase, which notification in writing is hereto annexed marked Exhibit "A;" and prior to the 1st day of December, 1912, your petitioner duly reimbursed H. B. Hollins & Co. for the full amount of the purchase price of said stock and commissions. The said H. B. Hollins & Co., have never delivered or tendered to your petitioner any certificate or certificates representing said 100 shares of stock of the Amalgamated Copper Company, or

any part thereof, and your petitioner has never directed the sale of said shares, and at all times from said 30th day of October, 1913, and until and including the 13th day of November, 1913, the said H. B. Hollins & Co. were at all times obligated to deliver to your petitioner, upon demand, a certificate or certificates representing the ownership of 100 shares of the capital stock of the Amalgamated Copper Company, upon payment by your petitioner of such amount as might then have been due from your petitioner to said H. B. Hollins & Co., for which said stock might then have been held as security.

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Third. On information and belief the books of H. B. Hollins & Co., show that on the 13th day of November, 1913, said H. B. Hollins & Co., were obligated to carry or hold for the account of customers, shares of the capital stock of the Amalgamated Copper Company, as follows:

Arthur B. Duel, New York City	100	shares
Hugo Landeau, Berlin, Germany	100	"
Weiner, Levy & Co., Berlin, Germany	50	"
L. M. Bamberger, " "	30	"

and that on said date, said H. B. Hollins & Co., were not obligated to carry or hold, and were not in fact carrying or holding, any shares of capital stock of the Amalgamated Copper Company for any persons except as aforesaid.

Fourth. On information and belief on the 13th day of November, 1913, said H. B. Hollins & Co. had in their possession, certificate No. 29,373 for 100 shares of stock of the Amalgamated Copper Company, in the name of William L. Jones, endorsed in blank for transfer, which was located in its safe deposit box, free of any pledge by said firm, the said Jones having, or claiming to have, no interest in said certificate of stock, and which certificate has since come into the possession of said A. Leo Everett, as Receiver; and on said day the Kings County Trust Company of New York City had in its possession a certificate for 50 shares of the Amalgamated Copper Company, standing in the name of H. B. Hollins & Co., which had been heretofore pledged by said H. B. Hollins & Co. with said Trust Company as security for a loan; and the National Bank of Commerce of New York City had in its possession a certificate for 30 shares of Amalgamated Copper Company, standing in the name of H. B. Hollins & Co., which had been theretofore pledged with said Bank by said H. B. Hollins & Co. as security for a loan.

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The said H. B. Hollins & Co. did not, on said 13th day of November, 1913, have in their possession or under their control any stock of the Amalgamated Copper Company except as aforesaid.

On information and belief on the 21st day of November, the Kings County Trust Company sold for the account of H. B. Hollins & Co. at the price of $3,449, the certificate for 50 shares of Amalgamated Copper Company so on deposit with it, together with other collateral, and on the 17th day of November, the National Bank of Commerce sold for the account of H. B. Hollins & Co., at the price of $2,121.90, the certificate for 30 shares of Amalgamated Copper Company so on

deposit with it, together with other collateral, and the Kings County Trust Company and the National Bank of Commerce have applied the proceeds of the sale of said certificates of stock of the Amalgamated Copper Company sold by them, respectively, amounting in the aggregate to $5,570.90, to the satisfaction of their respective loans to H. B. Hollins & Co., with the result that the amount, if any, remaining from the proceeds of the sale of said certificates, after the payment of said loans, is in each case nominal.

On information and belief since the 13th day of November, 1913, A. Leo Everett, as Receiver, has caused the aforesaid certificate No. 29,373 for 100 shares of stock of the Amalgamated Copper Company to be transferred into his own name and has received, and now holds, Certificate No. H40586 representing the ownership
5 of said one hundred shares standing in his name as such Receiver on the books of said Company.

Fifth. On information and belief, no one of the customers for whom H. B. Hollins & Co. were carrying shares of Amalgamated Copper at the time of the filing of the petition in bankruptcy against said H. B. Hollins & Co. was the sole owner of the said certificate No. 29,373 for 100 shares of the capital stock of Amalgamated Copper Company in the safe deposit box of H. B. Hollins & Co., and the 100 shares of Amalgamated Copper Company represented by said certificate were carried by said H. B. Hollins & Co. for the joint and proportionate benefit of said customers.

Sixth. On information and belief said H. B. Hollins & Co. at the time of the filing of the petition in bankruptcy as aforesaid did not have in their possession, or under their control, any certificates representing shares of Amalgamated Copper Company separately and specifically carried for the account of your petitioner, and your petitioner is the owner of, and entitled to, an undivided 100/280ths or 5/14ths interest in the 100 shares of Amalgamated Copper represented by certificate No. H40,586 now in the possession of the receiver.

Seventh. On information and belief H. B. Hollins & Co., prior to the 13th day of November, 1913, sold, pledged and otherwise disposed of your petitioner's interest in and to the 280 shares of Amalgamated Copper carried by H. B. Hollins & Co. for the account of your petitioner and other customers as aforesaid to the extent of 9/14ths of 100 shares of Amalgamated Copper, and the value of said 9/14ths of 100 shares of Amalgamated Copper at the time of the filing of said petition was $4,427.64: the lowest price at which said stock sold on said day on the New York Stock Exchange
6 (which is the recognized principal market for the purchase and sale of said stock), being 68⅞.

Eighth. On the 1st day of November, 1913, your petitioner was indebted to H. B. Hollins & Co. for amounts loaned to your petitioner, in the sum of $3,326.01, which amount together with interest thereon at the rate of 6% per annum from the 1st day of November, 1913, to and including the 13th day of November, 1913, amounting to $7.28, represented the total indebtedness due from your petitioner to H. B. Hollins & Co., on said 13th day of November, 1913.

Your petitioner is entitled to have credited upon and offset against his aforesaid indebtedness to H. B. Hollins & Co. of $3,333.29, an amount in excess of said indebtedness by reason of the fact that said H. B. Hollins & Co., as alleged in paragraph Seventh hereof, has disposed of 9/14ths of 100 shares of Amalgamated Copper belonging to your petitioner, which was of the value of $4,427.64 on the 13th day of November, 1913.

Ninth. By reason of the premises, your petitioner has an undivided interest of at least 5/14ths in and to the 100 shares of the capital stock of the Amalgamated Copper Company represented by certificate No. H40586 in the hands of A. Leo Everett, as Receiver, and is entitled to demand and receive of said A. Leo Everett, as Receiver as aforesaid, the delivery of at least 5/14ths of the 100 shares of the capital stock of the Amalgamated Copper Company represented by certificate No. H40,586, or 35.71 shares of said stock, together with 5/14ths of the amount of all dividends that may have been, or may be, declared and may have been or may be paid to said Receiver upon said 100 shares of said stock subsequent to November 13, 1913. Your petitioner has made demand upon the said Receiver for the delivery to him of said stock and said amount of cash,
7 but the said Receiver has referred your petitioner and his demand to the action of this Court.

Tenth. On information and belief the only persons having or who may claim to have any interest in the 100 shares of the capital stock of Amalgamated Copper, represented by certificate No. H40586 in the hands of A. Leo Everett, as Receiver as aforesaid, are:

Weiner, Levy & Co., whose post-office address is Charlottenstrasse 60, Berlin, W. 8. Germany, and who are represented by Messrs. Cravath & Henderson, attorneys of No. 52 William Street, New York City, who have heretofore appeared for them in these bankruptcy proceedings;

L. M. Bamberger, whose post-office address is Jagerstrasse 40, Berlin, W. 16, Germany, and who is represented by Messrs. Stroock & Stroock, attorneys of 30 Broad Street, New York City, who have heretofore appeared for him in these bankruptcy proceedings;

Hugo Landau, whose post-office address is Williamstrasse, 70 B, Berlin, W. 87, Germany, and who has not heretofore appeared in these bankruptcy proceedings, either personally or by counsel; and

A. Leo Everett, Receiver of H. B. Hollins & Co., of 37 Wall Street, New York City.

Eleventh. No previous application for the relief herein prayed for has been made to any court or judge.

Wherefore, your petitioner prays that an order may be made by your Honorable Court, directing A. Leo Everett, as Receiver as aforesaid, to transfer and deliver, or cause to be transferred and delivered to your petitioner a certificate or certificates representing the ownership of 35 shares of the capital stock of the Amalgamated Copper Company, and, for that purpose, authorizing and directing
8 the Receiver to cause such transfers of said certificate No. H40586 representing 100 shares of the capital stock of the Amalgamated Copper Company in his hands to be made as will en-

able him to comply with such direction, and directing said Receiver to pay to your petitioner the sum of $48.90 out of the general estate in his hands, or out of the proceeds of the sale of one of said 100 shares, being 71/100ths of the lowest market value (68⅞) of one share of the capital stock of the Amalgamated Copper Company on the 13th day of November, 1913, and for that purpose to sell one of said shares, if necessary, and directing said Receiver to pay to your petitioner an amount equal to 5/14ths of any dividends which may have been received by said Receiver on the 100 shares of the capital stock of the Amalgamated Copper Company represented by certificate No. H40,586, being not more than the interest of your petitioner in said dividends; and that an order be issued requiring Weiner, Levy & Co., L. M. Bamberger, Hugo Landau and the said Receiver to appear upon a day to be therein fixed, and to show cause why the relief prayed for by the Petitioner should not be granted with such provision for service thereof upon said persons or their attorneys as to this Honorable Court may seem proper, and for such other and further relief in the premises as may be just and proper.

And your petitioner will ever pray, &c.

Dated, New York, January 28, 1914.

ARTHUR B. DUEL, *Petitioner.*

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Petitioner.

Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

9 UNITED STATES OF AMERICA,
State of New York, County of New York, ss:

Arthur B. Duel, being duly sworn, says, that he is the petitioner named in the foregoing petition; that he has read the foregoing petition, and knows the contents thereof, and does hereby make solemn oath that the statements of fact contained in the said petition are true to the best of his knowledge, information and belief.

ARTHUR B. DUEL.

Subscribed and sworn to before me this 28 day of January, 1914.

[SEAL.]

JOHN F. DAY,
Notary Public, New York County No. 842,
New York Register No. 5082.

10 EXHIBIT A.

H. B. Hollins & Co.

NEW YORK, Oct. 30, 1912.

Dr. A. B. Duel.

DEAR SIR: We beg to advise you that we have this day bought for your account the following named securities.

No. of shares. Bonds.	Description.	Price.	Time.	From whom bought.
100	Bag & Paper	12	R	Griesel & Rogers
100	Am'l Copper	82½	R	Potter Choate

Very respectfully yours,

H. B. HOLLINS & CO.,
By S.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House.

2. That all securities from time to time carried in the customer's marginal account, or deposited to protect the same, may be loaned by the broker, or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer.

(Endorsed:) In Bankruptcy—No. 18935 in the District Court of the United States for the Southern District of New York.—In the matter of Harry B. Hollins, Briton N. Busch, John A. Aull,
11 Anthony H. Walburg and Walter Kutzleb individually and as members of the firm of H. B. Hollins and Company, Alleged Bankrupts.—Petition.—Copy.—Hawkins, Delafield & Longfellow, Attorneys for petitioner.—Office and P. O. Address, 20 Exchange Place, Borough of Manhattan, New York.—To Messrs. Lexow, Mackellar & Wells, Atty's for Receiver.

In the District Court of the United States for the Southern District of New York.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. AULL, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins and Company, Alleged Bankrupts.

Order to Show Cause.

Filed March 2, 1914.

Upon the annexed Petition in Bankruptcy herein and the petition of Arthur B. Duel, verified January 28, 1914, praying that A. Leo Everett, Receiver herein, be directed to deliver to the petitioner certain shares of stock of the Amalgamated Copper Company, and to make certain payments to the petitioner, and for other relief,
12 from which petition of Arthur B. Duel it appears that Weiner, Levy & Co., whose post office address is Charlottenstrasse 60, Berlin W. 8, Germany, L. M. Bamberger, whose post office address is Jagerstrasse 40, Berlin W. 16, Germany, and Hugo Landau, whose

post office address is Williamstrasse 70 B, Berlin W. 87, Germany, have, or may claim to have, an interest in certain shares of stock of the Amalgamated Copper Company in the hands of the Receiver, for the transfer and delivery of a part of which the petitioner prays, and that the said Weiner, Levy & Co. have heretofore appeared in this bankruptcy proceeding by Messrs. Cravath & Henderson, attorneys of No. 52 William Street, New York City, and that L. M. Bamberger has heretofore appeared in this bankruptcy proceeding by Messrs. Stroock & Stroock, attorneys, of 30 Broad Street, New York City, and that Hugo Landau has no personal or legal representative in the United States to the knowledge of the petitioner, and on motion of Hawkins, Delafield & Longfellow, attorneys for petitioner, it is

Ordered that A. Leo Everett, as Receiver of H. B. Hollins & Co., Weiner, Levy & Co., L. M. Bamberger and Hugo Landau show cause before this Court at a stated term thereof, to be held in the United States Court House in the Borough of Manhattan, City of New York, on the 2nd day of March, 1914, at 10:30 o'clock on said day, or as soon thereafter as counsel can be heard, why the petitioner should not have the relief prayed for in the aforesaid petition, and such other and further relief as may be just; and it is

Further ordered that a copy of said petition and of this order be served upon Messrs. Cravath & Henderson, as attorneys for Weiner, Levy & Co., upon Messrs. Stroock & Stroock, as attorneys for L. M. Bamberger and upon A. Leo Everett, as Receiver of H. B.
13 Hollins & Co., or upon his attorneys Messrs. Lexow, Mackellar & Wells, and that copies of said petition and of this order be mailed enclosed in postpaid envelopes addressed respectively to Hugo Landau, Williamstrasse 70 B, Berlin W. 87, Germany, to Weiner, Levy & Co., Charlottenstrasse 60, Berlin W. 8, Germany, and to L. M. Bamberger, Jagerstrasse 40, Berlin W. 16, Germany, on or before the 30th day of January, 1914, and service of such order within the time and in the manner aforesaid, shall be deemed sufficient.

JULIUS M. MAYER,
District Judge.

Approved as to form but without prejudice.
Dated, N. Y., Jan. 28th, 1914.
LEXOW, MACKELLAR & WELLS,
Att'ys for Rec'rs.

(Endorsed:)—United States District Court, Southern District of New York.—In Bankruptcy—No. 18935.—In the Matter of Harry B. Hollins, Briton N. Busch, John A. Aull, Anthony H. Walburg and Walter Kutzleb, individually and as members of the firm of H. B. Hollins and Company, Alleged Bankrupts.—Order to Show Cause.—Hawkins, Delafield & Longfellow, Attorneys for Petitioner, Office and P. O. Address, 20 Exchange Place, Borough of Manhattan, New York.—To Messrs. Lexow, Mackellar and Wells, Att'ys for Receiver.

14 In the District Court of the United States for the Southern District of New York.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. Aull, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.

Filed March 2, 1914.

STATE OF NEW YORK,
County of New York, ss:

M. Gregg Latimer, being duly sworn deposes and says that he is an attorney-at-law and managing clerk in the office of Hawkins, Delafield & Longfellow, the attorneys for A. B. Duel, the petitioner herein, and the office and Post-Office address of such attorneys is No. 20 Exchange Place in the Borough of Manhattan, City of New York. That on the 29th day of January, 1914, deponent served a petition and order to show cause, of which the annexed are originals, upon Hugo Landau, Weiner, Levy & Co. and L. M. Bamberger, by depositing true copies of each of them, properly enclosed in a securely closed and postpaid wrapper in a branch Post-Office, regularly maintained by the Government of the United States, and under
15 the care of the Post-Office at No. 60 Wall Street, in the Borough of Manhattan, City of New York, directed to said Hugo Landau at Williamstrasse 70 B, Berlin W. 87, Germany, to Weiner, Levy & Co., at Charlottenstrasse 60, Berlin W. 8, Germany, to L. M. Bamberger, at Jagerstrasse 40, Berlin W. 16, Germany, such addresses being the respective offices where the persons above named keep an office.

M. GREGG LATIMER.

Sworn to before me this 30th day of January, 1914.
[NOTARIAL SEAL.] LOUIS J. DE MILHAU,
Notary Public, New York County No. 902,
New York Register No. 5186.

United States District Court, Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts.

Filed March 23, 1914.

A. Leo Everett, the Receiver herein, by Lexow, Mackellar & Wells, as his attorneys, for answer to the petition of Arthur B. Duel, verified the 28th day of January, 1914, alleges:

First. Has not information sufficient to form a belief, as to how the shares of Amalgamated Copper Co., referred to in the
16 Fifth paragraph of the petition, were carried by H. B. Hollins & Co., or whether they were carried for the joint and proportionate benefit of certain customers or not.

Second. Denies that the petitioner is the owner of, or entitled to, an undivided 100/280ths or 5/14ths in or of the 100 shares of Amalgamated Copper as alleged in the Sixth paragraph of the petition.

Third. Has no information sufficient to form a belief as to the allegations contained in the Seventh paragraph of the petition.

Fourth. Has not information sufficient to form a belief as to the allegations contained in the second half of the Eighth paragraph of the petition.

Fifth. Denies the allegations contained in the Ninth paragraph of the petition, except that he admits that a demand was made upon him as therein alleged and that said demand was referred to this court.

Sixth. Has not knowledge sufficient to form a belief as to whether the persons mentioned in the Tenth paragraph of the petition are the only persons having, or who may have, any interest in the shares of stock referred to in said paragraph.

And for a further and separate defense to the claim, or cause of action, set forth in said petition, alleges:

Seventh. On information and belief that subsequent to the
17 1st day of December, 1912, the petitioner borrowed moneys from H. B. Hollins & Co., or obtained credits from H. B. Hollins & Co., by using the 100 shares of the capital stock of the Amalgamated Copper Co., purchased by him on or about the 30th day of October, 1912, as collateral, or as security, for the moneys thus borrowed, or the credits so obtained.

And for a further and separate defense to the claim, or cause of action, set forth in said petition, alleges:

Eighth. On information and belief that claimant is indebted to H. B. Hollins & Co. in the sum of $3,333.22, more or less, together with interest thereon from November 13, 1913.

Ninth. That claimant has not tendered to H. B. Hollins & Co., or to this Receiver, as a condition *to* the return to him of the 5/14ths of 100 shares of Amalgamated Copper Co. stock, now sought to be reclaimed, the amount due from him to said H. B. Hollins & Co., or any portion of same.

Wherefore, A. Leo Everett, as Receiver as aforesaid, prays that the petition herein may be denied, and that such other or further relief may be granted as may be just and proper in the premises.

LEXOW, MACKELLAR & WELLS,
Attorneys and Solicitors for Receiver.

Office & P. O. Address, 43 Cedar Street, Borough of Manhattan, New York City.

18 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

A. Leo Everett, being duly sworn, makes solemn oath and says that he is the Receiver herein; that he has read the foregoing answer and knows the contents thereof, and that the statements of fact therein contained are true to the best of his knowledge, information and belief.

A. LEO EVERETT.

Sworn to before me this 28th day of February, 1914.
[NOTARIAL SEAL.] HARRY C. BATES,
Notary Public, Kings Co.

Cert. filed in New York Co.

(Endorsed:)—In Bankruptcy No. 18935.—United States District Court, Southern District of New York.—In the Matter of Harry B. Hollins, et al., Alleged Bankrupts.—Copy.—Answer to petition of Arthur B. Duel.—Lexow, Mackellar & Wells, Attorneys for Receiver, 43, Cedar Street, Borough of Manhattan, New York City.

19 In the District Court of the United States for the Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. AULL, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins and Company, Alleged Bankrupts.

Answer to Petition of Arthur B. Duel and Assertion of Claim.

Filed March 23, 1914.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Answer of Wiener, Levy & Co. to the Petition of Arthur B. Duel respectfully shows:

First. They admit the allegations of Paragraphs First, Third, Fourth, Fifth and Tenth of the said petition.

Second. Upon information and belief they admit the allegations of Paragraphs Second, Sixth, Seventh, Eighth, Ninth and Eleventh of said petition. And having fully answered the said petition so far as respects the allegations thereof concerning the claim of Arthur B. Duel in and to the 100 shares of the capital stock of the Amalgamated Copper Company, represented by the certificate No.
20 29373 now in the possession of the Receiver herein, the respondents, Wiener, Levy & Company, asserting their claim

to and interest in the said 100 shares of capital stock of Amalgamated Copper Company represented by said certificate, affirmatively allege in their own behalf as follows:

Third. They adopt and incorporate in this their answer and petition the allegation contained in Paragraphs First, Third, Fourth and Fifth of the said petition of Arthur B. Duel filed herein.

Fourth. On or about the 25th day of February, 1913, H. B. Hollins & Company, at the direction and request of the respondents, Wiener, Levy & Co., purchased for the account of said Wiener, Levy & Co. fifty shares of the capital stock of the Amalgamated Copper Company of the par value of $100 per share at 68⅜ and received in consummation of the said purchase Certificate No. 3556 representing 50 shares of the capital stock of the Amalgamated Copper Company. The said H. B. Hollins & Company duly notified the respondents of said purchase and that said H. B. Hollins & Company were carrying for respondent's account fifty shares of the said stock, and said H. B. Hollins & Company were duly reimbursed by respondents for said purchase as hereinafter set forth. The respondents, Wiener, Levy & Co. however never received said certificate, but the same was carried by said H. B. Hollins & Company and subsequently passed out of their possession and control on or about June 13, 1913, against a sale of capital stock of Amalgamated Copper Company for and in behalf of another customer of said H. B. Hollins & Company. The respondents, Wiener, Levy & Co., have never directed or authorized the sale of the said fifty shares of said Amalgamated Copper Company stock, or any part thereof, and they allege that said

21 H. B. Hollins & Company were at all times from the 25th day of February, 1913, and until and including the 13th day of November, 1913, obligated to deliver to said respondents, Wiener, Levy & Company, upon demand, a certificate or certificates representing the ownership of fifty shares of the capital stock of the Amalgamated Copper Company upon payment by said respondents of such amount, if any, as might then have been due from them to said H. B. Hollins & Company and for which said stock might then have been held as security.

Fifth. Upon information and belief said H. B. Hollins & Company at the time of the filing of the petition in bankruptcy, as aforesaid, did not have in its possession or under its control any certificates representing shares of the stock of Amalgamated Copper Company separately and specifically carried for the account of respondents, Wiener, Levy & Co., and said respondents are the owners of and are entitled to an undivided interest in the said 100 shares of Amalgamated Copper Company stock represented by the said certificate No. 29373 now in the possession of the Receiver herein. As set forth in the petition of said Duel, the only customers of said H. B. Hollins & Company, as appears by the books thereof, who were long of the said Amalgamated Copper Company's stock, that is to say, for whom the said H. B. Hollins & Company were carrying said stock, on the 13th day of November, 1913, were the petitioner Arthur B. Duel, in the amount of 100 shares; Hugo Landau, in the amount of 100 shares, the respondents, Wiener, Levy & Co., in the amount of 50

shares, and L. M. Bamberger in the amount of 30 shares. Upon information and belief respondents allege that said persons are the only ones having or claiming to have any interest in the said
22 100 shares of the Amalgamated Copper Company stock represented by Certificate No. 29373 in the hands of A. Leo Everett, Receiver herein. Said Bamberger resides in Berlin, Germany, his post-office address being Jagerst-asse 40, Berlin W. 16, and he has appeared and is represented herein by Messrs. Stroock & Stroock, attorneys at No. 30 Broad Street, New York City. Said Duel and respondents, Wiener, Levy & Co. and the Receiver, A. Leo Everett, Esquire, have appeared herein by counsel and the said Hugo Landau whose address is Williamstrasse 70 B, Berlin, W. 87, Germany, has been cited to appear herein upon the application of said Duel pursuant to the order entered herein.

Respondents allege upon information and belief that copies of said petition of said Duel and of said order were mailed in post-paid envelopes addressed to said Hugo Landau at his address aforesaid in compliance with the terms of said order and that proof of said service has been filed herein. The said Landau has not appeared herein, either in person or by attorney. The respondents represent, however, that in the order directing service on said Landau, by mailing post-paid to him a copy of said citation, similar provision was made as to serving the respondents, Wiener, Levy & Co., and respondent, L. S. Bamberger, both of whom reside in Berlin, Germany, and both of whom were so served, actually received said notices, and said notices were mailed precisely the same way as that mailed to said Landau.

And your respondents allege that they are entitled to at least 5/28 of the said 100 shares of Amalgamated Cooper Company stock in the hands of the Receiver herein on the basis of the said Landau being entitled to a proportionate interest on a claim of 100 shares and said Bamberger being entitled to a proportionate interest on a claim of 30 shares and the petitioner Duel being entitled to a
23 proportionate interest on the basis of a claim of 100 shares, or any larger amount than 5/28 of said 100 shares in the hands of the Receiver aforesaid in the event that it shall be found that the said Landau or the said Bamberger, or both, are entitled to a less or to no interest or claim in or to the said 100 shares so in the hands of the Receiver, as aforesaid.

Sixth. On the 13th day of November, 1913, respondents, Wiener, Levy & Co. were indebted to H. B. Hollins & Company in the sum of $23,803.47 including interest more or less. Against such indebtedness said H. B. Hollins & Company were carrying at that date for the account of respondents, Wiener, Levy & Co., besides the 50 shares of Amalgamated Copper Company stock, also 500 shares, Common, of the capital stock of the Southern Railway Company; 100 shares of the capital stock of Chicago, Milwaukee & St. Paul Railroad Company; 50 shares, Common, of the capital stock of the United States Steel Company and a subscription receipt for $18,000, National Properties Company Syndicate (64 per cent. returned). Since said 13th day of November, 1913, the said subscription receipt

for $18,000, National Properties Company Syndicate (64 per cent. returned) has been delivered to respondents. The said 500 shares of Southern Railway, Common, 100 shares of Chicago, Milwaukee & St. Paul and 50 shares of United States Steel, Common, had been hypothecated by said H. B. Hollins & Company as collateral in various loans negotiated by said H. B. Hollins & Company and on or after November 13, 1913, the said securities were sold out by the respective pledgees thereof. Thereupon said H. B. Hollins & Company and the Receiver thereof, of their own motion, and without the request of respondents, have offered to credit and actually have credited the account of respondents, Wiener, Levy & Com-
24 pany with the liquidating value of the said stocks so sold in the loans aforesaid, which liquidating value, as claimed by said H. B. Hollins & Company and the Receiver thereof, was, for 500 Southern Railway, Common, at 21½, the sum of $10,750; for 100 St. Paul at 99, the sum of $9,900; and for 50 Steel, Common, at 55¾, the sum of $2,787.50; in all the sum of $23,512.50. The debit balance of your respondent, Wiener, Levy & Co., $23,803.47, is thus reduced by the application of this credit, $23,512.50, to the sum of $290.97 more or less, which said sum is the only amount, if any, owing from respondents, Wiener, Levy & Co. to said H. B. Hollins & Co. or the Receiver thereof.

Seventh. Upon information and belief prior to the 13th day of November, 1913, H. B. Hollins & Company sold, pledged and otherwise disposed of respondent's, Wiener, Levy & Company's, interest in and to the shares of Amalgamated Company stock carried by H. B. Hollins & Company for the account of your respondent and other customers for whom said H. B. Hollins & Company were carrying said stock to an amount equal to 9/14 of 50 shares of Amalgamated Cooper and the value of said 9/14 of 50 shares of said stock at the time of the filing of the petition herein was $2,213.82, the lowest price at which said stock sold on said day at its recognized principal market, The New York Stock Exchange.

Eighth. On the 13th day of November, 1913, respondents were indebted to H. B. Hollins & Company for amounts loaned to them in the sum of $290.97 which amount, together with interest thereon at the rate of 6% per annum from the 13th day of November, 1913, represents the total indebtedness due from respondents at the present time in any way, even on the basis of accepting the credits
25 offered to respondents by said H. B. Hollins & Company and placed by the latter to respondents' account by taking the alleged liquidating prices of the Southern Railway, Common, St. Paul, and United States Steel Common stock carried by said Hollins & Company for your respondents and disposed of by said Hollins & Company as hereinabove set forth. Whereas your respondents allege that the liquidating price of the Southern Railway Common, as attempted to be fixed by said H. B. Hollins & Company, was at 21½ where the same stock has since sold (March 7, 1914) at 24⅞, and the liquidating price of United States Steel, Common, as attempted to be fixed by said H. B. Hollins & Company was at 55¾ whereas the

same stock has sold since (March 7, 1914) at 64⅜. And respondents claim the right to be credited with the liquidating prices of said last named stock at the figures above given in respect thereof.

Wherefore your respondents represent and allege that at all events they are entitled to have credited upon and offset against their aforesaid indebtedness to said H. B. Hollins & Company of $290.97, even admiting such an indebtedness, an amount in excess of said indebtedness by reason of the fact that said H. B. Hollins & Company as alleged herein, has disposed of 9/14 of the 50 shares of Amalgamated Copper stock belonging to respondents which was of the value of $2,213.82 on the 13th day of November, 1913.

Eighth. By reason of the premises the respondents have an undivided interest of at least 5/28 in and to the 100 shares of the capital stock of the Amalgamated Copper Company represented by Certificate No. 29373 in the hands of A. Leo Everett, as Receiver, and they are entitled to demand and receive of said A. Leo Everett, as Receiver herein, the delivery of at least 5/28 of the 100 shares
26 of the Common capital stock of the said Amalgamated Copper Company represented by the said Certificate, together with 5/28 of the amount of all dividends that may have been or may be declared, or may have been or may be paid to said Receiver upon said 100 shares of said stock subsequent to November 13, 1913. Your respondents have made demand upon the said Receiver for the delivery to them of said stock and said cash but the said Receiver has referred them and their demand to the action of this Court herein.

Wherefore respondents pray that an order may be made herein by this Honorabble Court as prayed for by the petition of Arthur B. Duel herein, ascertaining the interest of said Duel and of the other customers of said H. B. Hollins & Company mentioned in said petition, including respondents, Wiener, Levy & Co., in said 100 shares of stock represented by said certificate No. 29373 in the hands of the said Receiver; and directing said A. Leo Everett, Receiver as aforesaid, to transfer and deliver, or cause to be transferred and delivered, to your respondents, Wiener, Levy & Co., a certificate or certificates representing the ownership of at least 5/28 of 100 shares of the capital stock of the Amalgamated Copper Company, and for that purpose authorizing and directing the Receiver to cause such transfer of such Certificate No. 29373 representing 100 shares of said Amalgamated Copper Company stock to be made as will enable him to comply with such directions; and directing the said Receiver to pay to said respondents such sum of money as will represent respondents' pro rata interest in such dividends as may have been paid to said H. B. Hollins & Company or said Receiver on said Amalgamated Copper Company stock since the 13th day of November, 1913, or such pro rata larger amount than 5/28 of said 100 shares and of the dividends, if any, received thereon, as aforesaid, in the
27 even that any of the other persons who claim to have an interest in said 100 shares, held by the Receiver herein, shall be found to be entitled to a lesser interest, or to no interest, therein; and that the said order provide for such other and further relief as

to the Court may seem just or which the nature of respondents' case may require.

CRAVATH & HENDERSON,
Attorneys for Respondents, Wiener, Levy & Co.

Office and P. O. Address: 52 William Street, Borough of Manhattan, New York City.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Max Horowitz, being duly sworn, says that he is a member of the firm of Hallgarten & Company, Bankers, doing business at No. 5 Nassau Street, in the Borough of Manhattan, City of New York, in the Southern District of New York; that the said firm of Hallgarten & Company, is the representative and agent in this behalf of Wiener, Levy & Company, respondents in the foregoing answer; that affiant has read over the foregoing answer of the said Wiener, Levy & Company, and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to these matters he believes it to be true; that the grounds of his information and the sources of his belief as to all matters therein not stated upon his personal knowledge are cable correspondence of his said firm with said Wiener, Levy & Company, and inquiries and conversations
28 had with various persons informed of the matters stated in said answer; that the reason why this affidavit is not made by said Wiener, Levy & Company is that the said Weiner, Levy & Company are not within the County or Southern District of New York, but are non-residents thereof and residing in the City of Berlin, Germany.

(Sgd.) MAX HOROWITZ.

Sworn to before me this 12th day of March, 1914.
[L. S.] NORMAN HALL,
Notary Public for Kings County.

Certificate filed in New York County No. 115.

(Endorsed:)—District Court of the United States—Southern District of New York.—In the Matter of Harry B. Hollins, Briton N. Busch, John A. Aull, Anthony H. Walburg and Walter Kutzieb, individually and as members of the firm of H. B. Hollins & Co., Alleged Bankrupts.—Answer of Respondents Wiener, Levy & Company.—Cravath & Henderson, Attorneys for Respondents. No. 52 William Street, Borough of Manhattan, New York City.—Copy for Messrs. Lexow, Mackellar & Wells, Attorneys for A. Leo Everett, Esq., Receiver.

29 District Court of the United States for the Southern District of New York.

In Bankrutcy.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. Aull, Anthony H. Walburg, and Walter Kutzieb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.

In the Matter of the Application of ARTHUR B. DUEL for the Delivery of 35 71/100 Shares of Amalgamated Copper Stock, &c.

Filed March 23, 1914.

UNITED STATES OF AMERICA,
Southern District of New York,
County of New York, ss:

Charles M. Allaire, being duly sworn, deposes and says:

For some time prior to and up to and including the 13th day of November, 1913, I acted as cashier for H. B. Hollins & Co., then doing business at No. 15 Wall Street, New York City, and since November 13th, 1913, I have been in the employ of A. Leo Everett, Receiver of the estate of Hollins & Co., and have had charge and control of the books and records of Hollins & Co. in the hands of the Receiver, and I am familiar with the contents of said books and records.

30 It appears from said books and records that on the 13th day of October, 1912, Hollins & Co. purchased for the account of Arthur B. Duel, 100 shares of the capital stock of Amalgamated Copper Company of the par value of $100 each, and said Hollins & Co. actually received in consummation of such purchase, certificates representing 100 shares of said stock. The said 100 shares of Amalgamated Copper Company were never sold by Hollins & Co. pursuant to any order or authority of Arthur B. Duel. The particular certificates received by Hollins & Co. on account of said purchase for Arthur B. Duel were subsequently, and some time prior to the 13th day of November, 1913, disposed of by Hollins & Co. by deliveries on account of sales of said stock made by said firm for customers.

On the 13th day of November, 1913, the following were the only customers of Hollins & Co. who were long of Amalgamated Copper stock, that is to say, who had purchased such stock and for whom Hollins & Co. were carrying or obligated to carry the same:

Arthur B. Deul	100 shares
Hugo Landau	100 shares
Weiner, Levy & Co.	50 shares
L. M. Bamberger	30 shares

On the 13th day of November, 1913, Hollins & Co. had in their possession, or under their control, stock of Amalgamated Copper Company as follows:

Pledged with the Kings County Trust Company as security for a loan	50 shares
Pledged with the National Bank of Commerce as security for a loan	30 shares
In the Safe Deposit Box of Hollins & Co. free of pledge.	100 shares

31 That on or about the 25th day of October, 1912, L. M. Bamberger ordered H. B. Hollins & Co. to buy for his account 30 shares of stock of the Amalgamated Copper Company, and that a purchase was made accordingly on the New York Stock Exchange from H. Content & Co., and that thereafter and on the 25th day of October, 1912, the seller of this stock "asked for a name for transfer," which meant in the language of the Stock Exchange, that they wished to notify H. B. Hollins & Co. that they were prepared to deliver 30 shares of stock by transfer at the transfer office of the Company, that the title of the stock would pass to the purchaser by such transfer and that they wished to know the name to which the stock should be transferred. That the name given to the seller was that of H. B. Hollins & Co. and that thereupon H. B. Hollins & Co. paid the seller the agreed price of said stock. That certificate No. 13702 for 30 shares of Amalgamated Copper stock was delivered to H. B. Hollins & Co. on October 28th, 1912. That this certificate was pledged, with the consent of Bamberger, with the National Bank of Commerce, on or about October 30th, 1912, and was repledged on the various renewals of the loan made by the Bank, and was still held by the National Bank of Commerce at the time of the failure of H. B. Hollins & Co. on November 13th, 1913.

The shares of stock in the safe deposit box of Hollins & Co. were represented by certificate No. 29373, which was standing in the name of one William L. Jones, but indorsed in blank for transfer, the said Jones having no interest therein. Since the 13th day of November, 1913, A. Leo Everett, as Receiver, has caused the shares represented by certificate No. 29373 to be transferred into his own name and thereby received, and now has in his possession, certificate

32 No. H40586, in his name as Receiver as aforesaid, representing 100 shares of Amalgamated Copper Company stock.

The circumstances under which Hollins & Co. acquired possession of said certificate No. 29373 were as follows:

On Saturday, November 8th, 1913, pursuant to the order of one S. M. Schatzkin to sell short 200 shares of Amalgamated Copper stock, Hollins & Co. sold 200 shares of Amalgamated Copper on the New York Stock Exchange, and on the 10th day of November, 1913, in consummation of such short sale, delivered to Sharp & McV. (the name given by the Stock Exchange Clearing House) 100 shares of Amalgamated Copper stock, being the amount of such stock shown to be due on balance by Hollins & Co. to the Clearing House, which 100 shares were represented by two certificates for 50 shares each,

numbered 4503 and 4529, then held for the account of their long customers, the balance of 100 shares of stock so sold being, through the Clearing House operation delivered to the purchaser by means of 100 shares of said stock borrowed by Hollins & Co. from Slayback & Co. On the 10th day of November, 1913, pursuant to the direction of S. M. Schatzkin, Hollins & Co. covered Schatzkin's short sale of 200 shares of Amalgamated Copper Company stock by purchasing on the Stock Exchange 20 shares of Amalgamated Copper stock, and on the 11th day of November, 1913 (the Clearing House sheets showing that they were entitled on balance to 100 shares of Amalgamated Copper stock from E. Lawrence & Co., the 100 shares borrowed from Slayback & Co. having been returned to Slayback & Co. through the Clearing House operation), they received from E. Lawrence & Co. certificate No. 29373 for 100 shares of Amalgamated Copper stock standing in the name of William L. Jones and endorsed
33 in blank for transfer, and placed said certificate in their safe deposit box, where it remained until the filing of the petition in bankruptcy. The said certificate No. 29373 was never marked or otherwise identified by Hollins & Co. as the property of any particular person or customer, or placed in any envelope bearing any indication that the said stock was held for the special account of any particular customer or person, and no memorandum appears upon the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person.

Annexed hereto and marked Exhibit "A" is a copy of the Amalgamated Copper stock account as appearing on the books of Hollins & Co. from the 1st day of September (to which date the account was run down) until the close of business of said firm on the 13th day of November, 1913 (the items through which lines are drawn indicating that the transactions were closed out on the date shown following the item).

The left hand side of said account indicates the items of stock which Hollins & Co. were carrying for long customers or had borrowed, and the right hand side of said account indicates the location of stock which Hollins & Co. had in their possession or under their control, pledged or otherwise, or amounts of such stock which customers were short of.

That on November 10th, 1913, owing to short sales by customers of 300 shares of Amalgamated Copper stock, being 100 shares sold short by M. R. Hutchinson on or about October 10th, 1913, and 200 shares sold short by S. M. Schatzkin on November 8th, 1913, H. B. Hollins & Co. had been obliged to borrow 100 shares
34 in order to make delivery of the 300 shares of stock sold, the remaining 200 shares having been obtained by using stock carried for customers, so that on that date there remained only 80 shares of Amalgamated Copper stock under the control of the alleged bankrupts, which stock was pledged: 50 shares with the Kings County Trust Company and 30 shares with the National Bank of Commerce, the 30 shares pledged with the National Bank of Commerce being the certificate No. 13702 hereinabove referred to. There-

fore, a summary statement of that account on that day was as follows:

Long.		Short.	
Bamberger	30	Schatzkin	200
Duel	100	Hutchinson	100
Weiner, Levy	50	In Loans.	
Landau	100	Kings County Trust Co.	50
Borrowed for delivery	100	National Bank of Commerce	30
	380		380

At all times after the 1st day of November, 1913, as appears from said account, the customers who were long of Amalgamated Copper stock and for whom Hollins & Co. were obligated to carry such stock and the amount of stock of which they were long were the same as on the 13th day of November, 1913, as hereinbefore set forth, and at no time after the 1st day of November, 1913, did Hollins & Co. have in their possession or under their control an amount of Amalgamated Copper stock in excess of the amount of such stock which they were obliged to have on hand and to carry for the account of such long customers, to wit: 280 shares.

It was the practice of Hollins & Co. to use certificates of
35 stock on hand in making deliveries thereof, indiscriminately and without regard to particular certificates or certificate numbers, excepting only cases where customers deposited certificates of stock standing in their own names as margin for their own accounts, where such certificates were usually retained in kind, but at no time from the 1st day of November, 1913, until and including the 13th day of November, 1913, were there any certificates for Amalgamated Copper stock standing in the name of any customers.

Certificate No. 29373 representing 100 shares of Amalgamated Copper stock was not purchased or received for the account of any member of the firm of Hollins & Co., or for the personal account of said firm as a whole, but was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date.

It does not appear from the books of Hollins & Co. that there are any persons entitled to claim from Hollins & Co. delivery of any Amalgamated Copper stock, other than the following:

Arthur B. Duel	100 shares
Hugo Landau	100 shares
Weiner, Levy & Co.	50 shares
L. M. Bamberger	30 shares

and no claim of ownership in or to the delivery of Amalgamated Copper stock has been made or asserted by any other person since the appointment of the Receiver herein.

I further refer to the accounts of Hugo Landau, Weiner, Levy &

Co. and L. M. Bamberger, which are hereto annexed and marked respectively Exhibits "B," "C" and "D."

36 I further refer to the statement of account sent to Dr. Duel on or about November 1st, which is hereto annexed and marked Exhibit "E," and I further state that said account remained unchanged until the date of the filing of the petition in bankruptcy herein except for the accumulation of interest on the debt balance to the extent of $7.28.

CHARLES M. ALLAIRE.

Sworn to before me this 9th day of March, 1914.
[NOTARIAL SEAL.]
WM. JABINE,
Notary Public, Westchester County.

Certificate filed in New York Co. No. 20.
New York Register No. 5062.
Certificate filed in Bronx Co. No. 13.
Bronx County Register No. 508.

(Endorsed:) 18935.—U. S. District Court, Southern District of New York.—In the Matter of Harry B. Hollins, et al., Alleged Bankrupts.—Affidavit. Lexow, Mackellar & Wells, Attorneys for Receiver, 43 Cedar Street, Borough of Manhattan, New York City.

(Here follow tables, marked pages 37-41.)

EXHIBIT A.

AMALGAMATED COPPER CO.

1913				
Sept. 1	~~Geo. H. Lawler~~	~~50~~	~~10/17~~	
1	L. M. Bamberger	30		
1	Mr. A. B. Duell	100		
1	Weiner, Levy & Co.	50		
1	~~S. M. Schatzkin~~	~~200~~	~~9/22~~	
1	~~Wm. H. Fearing~~	~~200~~	~~9/15~~	
1	~~2/3 a/c London~~	~~500~~	~~9/5~~	~~London stock~~
15	~~Wm. H. Fearing~~	~~400~~	~~9/25~~	
25	~~Wm. H. Fearing~~	~~200~~	~~10/9~~	
Oct. 10	~~Wm. H. Fearing~~	~~200~~	~~10/29~~	
	~~R. S. Harmon, London a/c~~	~~1,000~~	~~10/14~~	
28	Hugo Landau	100		
	~~Felix Ulrich~~	~~100~~	~~10/30~~	
30	~~Stks. borrowed~~	~~100~~	~~10/31~~	
Nov. 10	~~Stks. borrowed~~	~~100~~	~~11/11~~	

AMALGAMATED COPPER CO.

1913				
Sept. 1	~~Nat'l Bk. Comce~~ 6/30	~~30~~		
1	~~M. R. Hutchinson Tdg. a/c~~	~~100~~	9/8	
	~~H. J. Nicholas & Co~~	~~300~~	9/25	
	~~Hopkins Bros~~	~~200~~	9/8	
	~~Solomon & Co., London~~	~~500~~	9/5	London stock
8	~~M. R. Hutchison Tdg. a/c~~	~~200~~	10/10	
	~~Hopkins Bros~~	~~100~~	9/15	
15	~~Hopkins Bros~~	~~300~~	9/22	
22	~~Hopkins Bros~~	~~100~~	10/9	
25	~~H. J. Nicholas & Co.~~	~~100~~	10/9	
Oct. 10	M. R. Hutchison Short a/c.	100		
	~~Kings County Tr. 6/9~~	~~75~~	10/17	
	~~Corn Exchange Bk. 9/25~~	~~125~~	10/25	
	~~Box~~	~~100~~	10/14	
	~~Solomon & Co., London~~	~~1,000~~	9/14	London stock
14	~~Hanover Nat'l 10/14~~	~~100~~	10/15	
15	~~Chase Nat'l Bk. 10/13~~	~~100~~	10/20	
17	~~Box~~	~~25~~	10/20	
20	~~Box~~	~~125~~	10/22	
22	~~Bank of Montreal 10/22~~	~~25~~	10/24	
	~~Box~~	~~100~~	10/23	
23	~~Transfer~~	~~100~~	10/24	
24	~~"~~	~~150~~	10/27	

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EXHIBIT

Dr. HUGO LANDAU In account current with H. B. HOLLINS & CO., New York, Nov. 13th, 1913. Cr.

Date.		Amount.	Days.	Interest.	Date.		Amount.	Days.	Interest.
1913									
Nov. 1	To Balance.....	21,989 80	13	21 62	Nov. 3	50 So. Pac. @ 86¼....	4,330 25		
	Long.					50 Un. Pac. 150½.....	7,505 25	11,835 50	
	50 U. S. Steel Com.					To Balance.....		10,175 92	21 62
	50 Un. Pac. Com.								
	50 So. Pac. Co.								
	100 Amal. Copper.								
13	Interest at 5%.....	21 62							
		22,011 42		21 62				22,011 42	21 62
Nov. 13	To Balance.....	10,175 92			Nov. 13	50 Steel Com. 55⅛....	2,787 50		
	Long.					100 Amal. Copper 70⅛.	7,012 50	9,800	
	50 Steel Com.					To Balance.....		375 92	
	100 Amal. Copper.								
		10,175 92						10,175 92	
Nov. 13	To Balance	375 92							

E. & O. E.
A. LEO EVERETT
Receiver for
H. B. Hollins & Co.
C. M. A

EXHIBIT C.

Dr. WIENER, LEVY & CO. In account current with H. B. HOLLINS & CO., NEW YORK, , 19 **Cr.**

Date.		Amount.	Days.	Interest.	Date.		Amount.	Days.	Interest
1913					1913				
Nov. 1	To Balance.....	23,760 57	13	42 90					
	Long 500 So. Ry. Com. 100 St. Paul 50 Copper 50 U. S. Steel $18,000 Natl. Properties Co. Subs. Receipt 64% Retd.								
" 13	Interest at 5%.....	42 90			Nov. 13	To Balance.....	23,083 47		42 90
		23,803 47		42 90			23,803 47		42 90
13	To Balance.....	23,803 47			13	500 So. Ry. @ 21-1/2. 10,750			
						100 St. Paul 99..... 9,900			
						50 Copper 70-3/8.... 3,518 75			
						50 U. S. Steel 55-3/4. 2,787 50	26,956 25		
	Balance.....	3,152 78					26,956 25		
		26,956 25				Balance.....	3,152 78		
" "	Long $18,000. National Properties Co. Subs. Receipt 64% Retd.				29	Dividend 50 Amal. Copper	75		
					Dec. 18	$18,000. National Properties Co. Subs. Receipt 64% Retd.			
						Balance.....	3,227 78		

E. & O. E.

A. LEO EVERETT
Receiver for
H. B. HOLLINS & Co.
C. M. A.

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EXHIBIT D.

DR. L. M. BAMBERGER In account current with H. B. HOLLINS & Co., NEW YORK, 19 CR.

Date.		Amount.	Days.	Interest.	Date.		Amount.	Days.	Interest.
1913					1913				
Nov. 1	To Balance	7,443 76	13	13 44					
	Long $9,000. Natl. Propy. Co. Subs								
	Recpt. 64 % Returned								
	30 Amal. Copper Co.								
	100 U. S. Steel Com.								
13	Interest @ 5%.....	13 44			Nov. 13	By Balance.....	7,457 20		13 44
		7,457 20		13 44			7,457 20		13 44
13	To Balance.....	7,457 20			13	30 Amal. Copper Co. @ 70 1/8	2,103 75		
	Long $9.000 Natl. Propy. Co. Subs.					100 U. S. Steel Com @ 55 3/4	5,575		
	Recpt. 64% Returned					$9,000. Natl. Prop. Co. Sub Recpt. 64% Returned			
	30 Amal. Copper Co.								
	100 U. S. Steel Com.								
	" Balance.....	221 55							
		7,678 75					7,678 75		
					13	By Balance.....	221 55		

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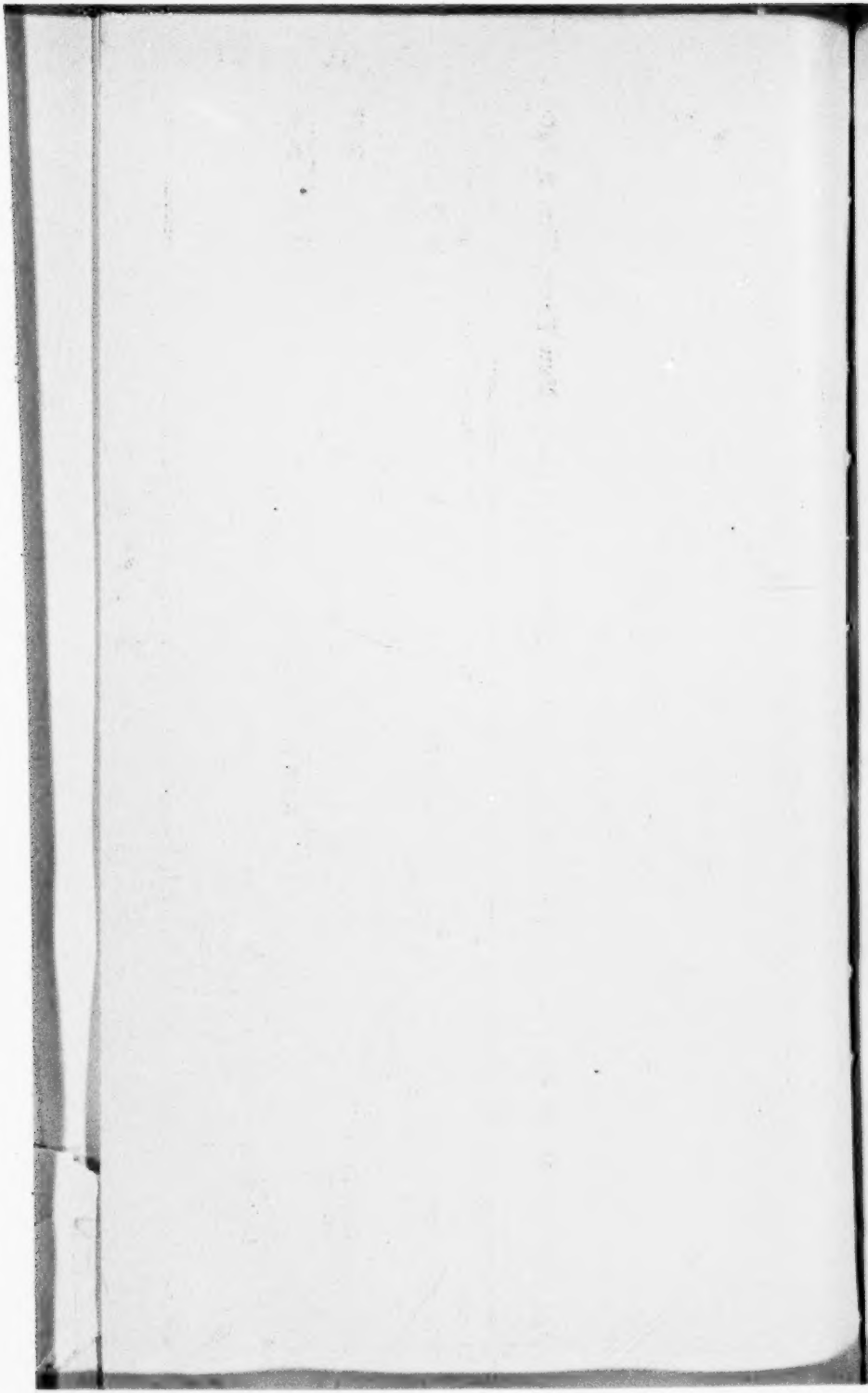
EXHIBIT "E."

DR. ARTHUR B. DUEL. In account current with H. B. HOLLINS & Co., NEW YORK, Nov. 1, 1913

Date		Dr.	Cr.	Dr. Balance	Cr. Balance	Days	Dr. Interest	Cr. Interest
Oct. 1	Balance	3,310 33		3,310 33		31	15 68	
	Long $18,000 Natl. Prop. Co. Subs. Recpt. 64% Retd.							15 68
	100 Amal. Copper Co.							
31	Balance Int. at 5%	15 68						
	Balance		3,326 01					
		3,326 01	3,326 01				15 68	15 68
Nov. 1	Balance			3,326 01				
	Long $18,000. Natl. Prop. Co. Subs Recpt. 64% Retd.							



42 United States District Court, Southern District of New York.

No. 18935.

In the Matter of HARRY B. HOLLINS et al., Trading as H. B. HOLLINS & COMPANY, Bankrupts.

Filed March 23, 1914.

On the Petition of Arthur B. Duel for the Distribution and Apportionment to Himself and Others Entitled of 100 Shares of the Stock of the Amalgamated Copper Company in Possession of Receiver of Above-named Bankrupt.

Mr. Wells for Everett, Receiver;
Mr. Longfellow for Duel, Petitioner;
Mr. McNamara for Wiener, Levy & Co.;
Mr. Armstrong for the Bankrupts.
Mr. Moses for Bamberger.

Statement of Facts.

Hollins & Co. (hereinafter called Hollins) were stock brokers, and went into bankruptcy November 13, 1913. On October 13, 1912, the petitioner Duel employed them to purchase for him 100 Shares of the stock of the Amalgamated Copper Company (hereinafter referred to as "Copper"). They did so and actually received certificates for that amount. These certificates Hollins' disposed of before bankruptcy, how or to whom is not known.

43 On October 25, 1912, one Bamberger likewise employed Hollins' to purchase 30 shares. They did so, received the stock and shortly thereafter pledged the same with the consent of Bamberger but for their own benefit with the National Bank of Commerce.

On the 25th of February, 1913, Wiener, Levy & Company (hereinafter called Wieners') employed Hollins' to purchase 50 Shares of Copper. The customers were notified that purchase had been made, and Hollins' charged themselves with the stock as "long" on their books. It is alleged, and not denied, that on or about June 13, 1913, the 50 Shares so bought passed out of the control of Hollins' "for and in behalf of another customer."

At a date not shown, but prior to November 1, 1913, Hollins' by their books appear to have purchased 100 Shares Copper for one Hugo Landau, and also by their books they asserted themselves to be in possession of this stock, as "long" for Landau's account.

At the close of business November 7, 1913, the books of Hollins' show them as responsible for 280 Shares of Copper, in the following proportion, viz:

Bamberger 30
Duel 100
Wiener, Levy & Co. 50
Landau 100.

But they had in possession only 100 shares. Bamberger's 30 Shares were, as above noted, pledged to the National Bank of Commerce, but for which particular customer the 100 Shares were held does not appear and cannot be ascertained.

It follows that Hollins' had apparently already converted 150 Shares (100 shs. "in box," 30 Shs. with National Bank of Commerce by Bamberger's consent, leaving 150 shs. missing).

44 On November 8, 1913 (a Saturday) one Schatzkin ordered Hollins' to sell for his account 200 Shares of Copper "short," and this was done. On the next business day, November 10, it was obligatory to make a delivery pursuant to the short sale; and delivery was made by Hollins' surrendering the 100 shares held as above for "account of their long customers," together with another 100 Shares borrowed by Hollins' for that purpose.

On the same November 10 Schatzkin ordered his brokers to "cover" the short sale, which was done by buying 200 Shares "on the market." This necessitated a Stock Exchange-Clearing House operation, as the result of which the borrowed shares were returned to the lender, and the 100 shares previously delivered were replaced by another 100 Shares in different certificates which Hollins' received from another brokerage house, on November 11th.

It is thus proven that 100 Shares which on November 7th, Hollins & Company had for account of their "long" customers, were used to make deliveries under "short" orders.

On the day of failure the bankrupts continued to be liable as above noted for 280 Shares of the stock in question; but they had in possession no more than the 100 Shares now in the Receiver's hands, the certificates for which had come to them two days before as the result of the Schatzkin speculation.

Transactions in "Copper" were not the only pieces of business transacted between the bankrupts and the persons heretofore enumerated. On November 13th Landau's account showed him indebted in the sum of $10,175.92, with certain securities, including the Copper stock in question, held as security therefor. This account has been liquidated by the Receiver, so far as appears with

45 Landau's consent, i. e., he has been credited with the values on the day of failure of the stocks held, so that on the papers before me they are gone, and Landau is still indebted to the bankrupt estate in the sum of $375.92.

Bamberger was in the same condition, and the Receiver has credited him with the values of his stocks on the day of failure, including the 30 Shares of Copper known to be in the possession of the National Bank of Commerce. By the account submitted Bamberger's interest in that stock has been wiped out by consent, and he has become a creditor of the bankrupt estate for $221.55.

Wieners' were in the same position on the date of failure, i. e., they were heavily indebted, and numerous stocks (including the Copper) were held by Hollins' as security. The Receiver in like manner has offered to liquidate this account. If the same principles were applied, there would result a balance in favor of Wieners' of

$3,227.78, and the Receiver is willing that they should be considered creditors for that sum.

Wieners', however, in their answer, in effect decline to assent to liquidation; they accept it only as far as necessary to wipe out their debit balance, so that their account as stated in the answer, shows the appropriation of all collateral except the 50 Shares of Copper, with the result that as of November 13, 1913, Wieners' are indebted to the estate in only $290.97, while the estate is still responsible for the 50 Shares of Copper.

From the papers before me it does not appear that any effort has been made to liquidate the account of Duel. In the account rendered him by the bankrupt as of November 1, 1913, he is shown to be in debt to Hollins' in the sum of $3,326.01, as against which the aforesaid 100 Shares of Copper is held as security.

46 "Copper" was quoted on November 13, 1913, at 70⅛, on which basis the liquidations referred to were made.

Under these circumstances Duel petitioned for an allotment to him of 100/280 of the Copper stock *of* the Receiver has in hand. Notice was given to all the other persons interested in Copper stock on "long" transactions, and Wieners' appeared and claim 50/280 thereof. Landau has not appeared, though duly notified. Bamberger submitted his rights claiming whatever relief was accorded Wieners'.

HOUGH, *D. J.:*

This claim is the legitimate aftermath of Gorman vs. Littlefield, 229 U. S., 19, if that decision logically follows Richardson vs. Shaw, 209 U. S., 265, and Sexton vs. Kessler, 225 U. S., 90. That there is such logical sequence Justice Day's opinion asserts, and it seems to me plain enough.

All these controlling cases fully accept the "grain-elevator" doctrine respecting stocks, so that a customer who finds any stock of the kind he bought on his broker's premises, can claim what he finds, for it is "unnecessary * * * to put his finger on the identical certificates purchased for him."

This right is helped out by that "presumption in favor of fair dealing" so much dwelt on in the higher courts, though said presumption is productive of cynic smiles even in counsel advancing the same, in Courts nearer real life,—as it is seen in stockbrokers' shops.

Putting together these controlling fictions, it is difficult to see what exclusive right any customer can have in any given certificate until he gets it in possession; but that claim still awaits decision.

47 If there were 280 (or more) shares of Copper in the Receiver's hands the Gorman case would be plainly applicable,—but there are only an hundred, and that fact is said to entail both a difference and distinction.

It is true that Day, J., twice referred to the presence of shares sufficient to satisfy the demand of the petitioner Gorman,—as if that fact were significant. It was significant, after the fictional presump-

tion had been made; that what the brokers had on hand, was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares, acquiring the exact amount taken, is quite significant of intent to make good the wrong done.

But if by dwelling upon number of shares on hand, anything more than this was meant, the logical symmetry of the fictions on which the decision rests is seriously impaired,—to say the least.

If stock purchasers dealing in a given stock at a given broker's, are entitled to regard his aggregate purchases as so much grain in a bin, (at least until he allots the stock in specie, if there is such a thing); and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of "stock-grain" is intended to fill up the bin again;—what difference can it make that when the broker is surprised by bankruptcy the bin is full or half full, or as here 10/28 full?

Again it is urged that Gorman's case did no more than relax the rules of identification. Gorman was refused any stock in this Court, because he could not identify as his the stock on hand, but the very ground of decision in the Supreme Court is that no identification is necessary,—the presumption of restitution plus the physical presence of some stock, supplies the lack,—"in the absence of counter-
48 vailing proof." To call what occurred in Gorman's case identification, is playing with words.

Now is there here any countervailing proof,—indeed this record is more favorable to Hollins' customers in Copper, than was the evidence in Gorman's case. It is uncontradicted that on November 7th, Hollins' had on hand 100 Shares "for account of their long customers." They were used to "carry" Shatzkin,—that they emerged from that transaction in different certificates, but unchanged in their relation to Hollins,' needs no exposition in a community much too familiar with transactions such as have here been outlined.

In short, if one deals with facts instead of fictions, it is true that any customer who had applied for his Copper before bankruptcy would have gotten these 100 Shares, or the proper part thereof.

The effect of bankruptcy is, that all apply together,—and so all must share pro rata.

Landau's account has been liquidated and he is still in debt,—therefore he has no claim.

Bamberger's situation is interesting but microscopic. It is known exactly what became of the paper called a certificate which Hollins' purchased for him. The pledge was lawful, and consented to. Bamberger never paid for that stock,—unless the Receiver's liquidation is payment. Unless he somehow pays he can get nothing. The Receiver's liquidation does not suit counsel, even partially; perhaps because it may deprive Bamburger of rights against any surplus in the Bank of Commerce loan. As Bamberger will not come upon this fund on the only basis admissible, he is relegated to his rights elsewhere.

Duel may recover 35.714 shares and Wiener 17.857 shares.
49 Their several indebtednesses may be set off against the shares not recoverable. The fractional shares must be adjusted in cash, at 70⅛.

March 23, 1914.

C. M. HOUGH, *D. J.*

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 23, 1914.

(Endorsed:) District Court of the United States, for the Southern District of New York.—In the Matter of Harry B. Hollins, et al., trading as H. B. Hollins & Company, Bankrupts.—(Copy).—Opinion.—Hough, D. J.

At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the Post Office Building, in the Borough of Manhattan, City and County of New York, on the 3rd Day of April, 1914.

Present: Hon. Charles M. Hough, United States District Judge.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. AULL, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Company, Alleged Bankrupts.

Order.

Filed April 3, 1913.

Upon reading and filing the petition of Arthur B. Duel,
50 verified January 28, 1914, praying that A. Leo Everett, Esq., as Receiver of the above-named alleged bankrupts, be directed to transfer and deliver to said petitioner certain shares of stock of the Amalgamated Copper Company, and to make certain payments to the petitioner and for other relief; the order to show cause why the prayer of said petition should not be granted; the affidavit of M. Gregg Latimer, verified January 30, 1914, from which it appears that service of said petition and order to show cause was duly made on Weiner, Levy & Company, L. M. Bamberger and Hugo Landau, on January 29, 1914, in accordance with the directions contained in said order to show cause; the answer of Weiner, Levy & Company, verified March 12, 1914; the answer of A. Leo Everett as Receiver of H. B. Hollins & Co., verified February 23, 1914; and the affidivt of Charles M. Allaire, verified March 9, 1914, submitted by and on behalf of the petitioner, Weiner, Levy & Co. and said Receiver; and upon all of the proceedings in the above entitled matter; and all of

the parties named in said order to show cause, except Hugo Landau, having duly appeared by their respective attorneys, namely, A. Leo Everett, Esq., Receiver herein, by his attorneys, Messrs. Lexow, Mackellar & Wells; Weiner, Levy & Company by their attorneys, Messrs. Cravath & Henderson; L. M. Bamberger by his attorneys, Messrs. Stroock & Stroock and H. B. Hollins & Company and Harry B. Hollins and Briton N. Busch, individually, alleged bankrupts above named by their attorneys, Messrs. Beckman, Menken & Griscom; and it appearing that a copy of said order to show cause and petition were duly served on Hugo Landau, as directed in said order to show cause, to wit, by mailing a copy thereof on January 29, 1914, postpaid, to said Landau at his office in Williamstrasse 70 B, Berlin W. 87, Germany; and after hearing Frederick W. Longfellow, Esq., of counsel for said petitioner in support of a motion for the
51 relief prayed for in said petition, and Stuart McNamara, Esq., of counsel for Weiner, Levy & Company in support of a motion for the relief prayed for in the answer of Weiner, Levy & Company; and T. Tileston Wells, Esq., of counsel for the Receiver herein, and William C. Armstrong, Esq., of counsel for the above-named alleged bankrupts, in opposition thereto:

Now on motion of Hawkins, Delafield & Longfellow, attorneys for said petitioner, and Cravath & Henderson, attorneys for Weiner, Levy & Company, it is hereby

Ordered that A. Leo Everett, as Receiver herein, transfer and deliver to said petitioner, Arthur B. Duel, a certificate or certificates representing thirty-five (35) shares of the capital stock of Amalgamated Copper Company and pay to said petitioner the sum of $50.07, being the value on the date of the filing of the petition in bankruptcy herein of .714 of one share of such stock; and that said Receiver transfer and deliver to respondents Weiner, Levy & Co. a certificate or certificates representing seventeen (17) shares of the capital stock of Amalgamated Copper Company and pay to said Weiner, Levy & Co. the sum of $60.09, being the value on the date of filing of the petition in bankruptcy herein of .857 of one share of such stock; and that said Receiver obtain, as against said certificate No. H-40586 for 100 shares of stock of Amalgamated Copper Company now in his hands, the issue of such of said shares of said stock, or cause to be made all such assignments and transfers of said certificate No. H-40586, and sell such of said shares of stock, as will enable him to make such transfers, deliveries and payments in compliance with the terms of this order.

And it is further ordered that A. Leo Everett, as Receiver
52 herein pay to said petitioner, Arthur B. Duel, 5/14 of any dividends which have been received by said Receiver on the 100 shares of the capital stock of the Amalgamated Copper Company represented by certificate No. H-40586; and that said Receiver pay to said Weiner, Levy & Co., 5/28 of any dividends which have been received by said Receiver on the 100 shares of the capital stock of the Amalgamated Copper Company represented by certificate No. H-40,586;

And it is further ordered that the indebtedness of said petitioner,

Arthur B. Duel, to the above named alleged bankrupts on November 13, 1913, viz.: $3,333.21, be set off against the value on said date of 64.286 shares of the capital stock of Amalgamated Copper Company not recoverable herein by the petition, at 70⅛ a share, to wit, $4,508.07; and that the indebtedness of said respondents Weiner, Levy & Co. to the above named alleged bankrupts on November 13, 1913, viz.: $290.97, be set off against the value on said date of 32.143 shares of the capital stock of Amalgamated Copper Company not recoverable herein by the respondents Weiner, Levy & Co. at 70⅛ a share, to wit, $2,254.02.

C. M. HOUGH, *D. J.*

(Endorsed:) United States District Court, Southern District of New York.—In Bankruptcy No. 18935.—In the Matter of Harry B. Hollins, Briton N. Busch, John A. Aull, Anthony H. Walburg and Walter Kutzleb, individually and as members of the firm of H. B. Hollins and Company, Alleged Bankrupts.—(Copy.)—Order with Notice of Entry.—Hawkins, Delafield & Longfellow, Attorneys for petitioner, Arthur B. Duel, 20 Exchange Place, New York City.—Cravath & Henderson, Attorneys for Weiner, Levy & Co., 52 William Street, New York City.

53 United States District Court, Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts.

Filed April 13, 1914.

To the Honorable Judge of the District Court of the United States for the Southern District of New York:

A. Leo Everett, Receiver of H. B. Hollins & Co., et al., alleged bankrupts, and H. B. Hollins & Co., et al., alleged bankrupts, considering themselves aggrieved by an order made and entered in the United States District Court, for the Southern District of New York, on the 3rd day of April, 1914, granting the petition of Arthur B. Duel, and directing that the Receiver herein transfer and deliver to said Arthur B. Duel and Wiener, Levy & Co., certain shares of stock of the Amalgamated Copper Company in his possession, and directing him to perform such other acts as are mentioned in said order, do hereby petition for an appeal from the said order of April 3, 1914, to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors filed herein, and pray that this appeal may be allowed, and that a transcript of the record papers and proceedings upon which said order

was made duly authenticated, may be sent to the United
54 States Circuit Court of Appeals for the Second Circuit.

LEXOW, MACKELLAR & WELLS,
Attorneys for Receiver.
BEEKMAN, MENKEN & GRISCOM,
Att'ys for H. B. Hollins & Co.

The foregoing appeal and petition therefor is hereby allowed.
Dated, April 13th, 1914.

C. M. HOUGH,
District Judge.

SIRS: Please take notice that the within is a copy of a Petition for Appeal this day duly filed in the within entitled matter in the office of the Clerk of the United States District Court, Southern District of New York.

Dated, New York, April 13, 1914.

Yours, etc.,

LEXOW, MACKELLAR & WELLS,
Attorneys for Receiver.

43 Cedar Street, Borough of Manhattan, New York City.

To Stroock & Stroock, Attorneys for L. M. Bamberger; Cravath & Henderson, Esqs., Attorneys for Wiener, Levy & Co.; Hawkins, Delafield & Longfellow, Esqs., Attorneys for Arthur B. Duel.

(Endorsed:) In Bankruptcy No. 18935.—United States District Court, Southern District of New York.—In the Matter of
55 Harry B. Hollins, et al., Alleged Bankrupts.—Petition for Appeal and Allowance thereof and Notice of Filing.—Lexow, Mackellar & Wells, Attorneys for Receiver, 43, Cedar Street, Borough of Manhattan, New York City.—Copy received Apr. 16, 1914. Cravath & Henderson, Attorneys for Wiener, Levy & Co.—Copy rec'd April 16, 1914.—Stroock & Stroock, Att'ys L. M. Bamberger.—Copy Rec'd April 16, 1914.—Hawkins, Delafield & Longfellow, Att'ys for Petitioner Duel.

United States District Court, Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of H. B. HOLLINS & Co. et al., Alleged Bankrupts.

Assignment of Errors.

Filed April 13, 1914.

Now, on the 13th day of April, 1914, comes A. Leo Everett, as Receiver of H. B. Hollins & Co., et al., alleged bankrupts, by his at-

torneys, Lexow, Mackellar & Wells, and H. B. Hollins & Co., et al., alleged bankrupts, by their attorneys, Beekman, Menken & Griscom, and say that the order in said cause entered on the 3rd day of April, 1914, directing the Receiver herein to do certain acts therein more fully specified, is erroneous and against the just rights of the
56 said Receiver and the said alleged bankrupts, for the following reasons:

First. That the said District Court erred in making said order, entered as aforesaid, on the 3rd day of April, 1914.

Second. That the said District Court erred in directing the Receiver herein to transfer and deliver to Arthur B. Duel a certificate or certificates representing thirty-five shares of the capital stock of the Amalgamated Copper Company.

Third. That the said District Court erred in directing the Receiver herein to pay the said Arthur B. Duel the sum of $50.07, being the value on the date of the filing of the petition in bankruptcy herein of .714 of one share of Amalgamated Copper Company stock.

Fourth. That the said District Court erred in directing that the Receiver herein transfer and deliver to Wiener, Levy & Company, a certificate or certificates, representing seventeen shares of the capital stock of the Amalgamated Copper Company.

Fifth. That the said District Court erred in directing that the Receiver herein pay to Wiener, Levy & Company the sum of $60.09, being the value on the date of the filing of the petition in bankruptcy herein of .857 of one share of Amalgamated Copper Company stock.

Sixth. That the said District Court erred in directing that the said Receiver obtain or cause to be made such assignments and transfers of certificate number H-40586 of Amalgamated Copper Company stock and to sell such stock as will enable him to make the transfers and deliveries and payments, in compliance with the terms of said order.

57 Seventh. That the said District Court erred in directing that the said Receiver pay to Arthur B. Duel 5/14 of any dividends which have been received by said Receiver on the 100 shares of the capital stock of the Amalgamated Copper Company, represented by certificate number H-40586.

Eighth. That the said District Court erred in directing that the said Receiver pay to Wiener, Levy & Company, 5/28 of any dividends which have been received by said Receiver on the 100 shares of the capital stock of the Amalgamated Copper Company, represented by certificate number H-40586.

Ninth. That the said District Court erred in directing that the indebtedness of Arthur B. Duel to the alleged bankrupts herein on November 13th, 1913, amounting to $3,333.21 be set off against the value on said date of 64.286 shares of the capital stock of the Amalgamated Copper Company not recovered by the said Arthur B. Duel at 70⅛ a share, to wit, $4,508.07.

Tenth. That the said District Court erred in directing that the indebtedness of Wiener, Levy & Company to the alleged bankrupts herein on November 13th, 1913, amounting to $290.97 be set off

against the value on said date of 32.143 shares of the capital stock of Amalgamated Copper Company, not recovered by said Wiener, Levy & Company at 70⅛ a share, to wit, $2,254.02.

Eleventh. That the said District Court erred in finding that H. B. Hollins & Co. had apparently converted 150 shares of Amalgamated Copper stock on or before November 7th, 1913.

Twelfth. That the said District Court erred in finding that the 100 shares of Amalgamated Copper Company stock which
58 H. B. Hollins & Co. held on November 7th, 1913, were held for account of their "long" customers, meaning thereby, for all of them.

Thirteenth. That the said District Court erred — finding that notice of this proceeding was given to all persons interested in Amalgamated Copper stock on "long" transactions.

Fourteenth. That the said District Court erred in finding, as a matter of law, that the cases of German vs. Littlefield, Richardson vs. Shaw and Sexton vs. Kessler are controlling upon the decision of this case.

Fifteenth. That the said District Court erred in finding, as a matter of law, that the cases of Gorman vs. Littlefield, Richardson vs. Shaw and Sexton vs. Kessler fully accept the "grain elevator" doctrine respecting stocks, so that a customer who finds any stock of the kind he bought on his broker's premises, can claim what he finds, on the ground that it is "unnecessary * * * to put his *figure* on the identical certificates purchased for him."

Sixteenth. That the said District Court erred in finding, as a matter of law, that the facts in this case could not be distinguished from those in the case of Gorman vs. Littlefield.

Seventeenth. That the said District Court erred in finding, as a matter of law, that it can make no difference to a creditor's right to reclaim stock, what proportion of a particular stock which a broker ought to have on hand, he may actually have on hand when bankruptcy ensues.

Eighteenth. That the said District Court erred in refusing
59 to find, as a matter of law, that the case of Gorman vs. Littlefield did no more than relax the rules of identification.

Nineteenth. That the said District Court erred in finding, as a matter of law, that the ground of decision in the case of Gorman vs. Littlefield is that no identification is necessary, and that the presumption of restitution plus the physical presence of some stock supplies this lack "in the absence of contervailing proof."

Twentieth. That the said District Court erred in finding, as a matter of law, that there was no countervailing proof to identify the 100 shares of Amalgamated Copper Company stock in the possession of the Receiver as having been acquired for other persons than the claimants herein.

Twenty-first. That the said District Court erred in finding, as a matter of law, that the effect of bankruptcy is that all customers who are entitled to a certain kind of stock are deemed to apply together and must share pro rata in all such stock which comes into possession of the bankruptcy court.

Twenty-second. That the said District Court erred in finding, as a matter of law, that Duel might recover 35.714 shares of Amalgamated Copper stock and Wiener 17.857 shares from the 100 shares of such stock in the possession of the Receiver.

Twenty-third. That the said District Court erred in finding, as a matter of law, that their several indebtedness might be set off against the shares not recoverable.

Twenty-fourth. That the said District Court erred as a mat-
60 ter of law, in failing to find that claimant was required to identify stock sought to be reclaimed.

Twenty-fifth. That the said District Court erred, as a matter of law, in failing to find that the burden of proof is on the claimant to sufficiently identify stock claimed.

Twenty-sixth. That the Court erred, as a matter of law, in failing to find that these claimants failed to identify the stock claimed and to sustain said burden of proof.

Twenty-seventh. That the said District Court erred, as a matter of law, in failing to find that the claimants could not sustain the burden of proof by basing their claim of identification upon inferences founded upon presumptions, without substantive testimony to sustain them.

Twenty-eighth. That the said District Court erred, as a matter of law, in failing to find that the claimants were under the burden of proving their title to the stock claimed and failed to do so.

Twenty-ninth. That the said District Court erred, as a matter of law, in failing to find that claimants' evidence left the matter of identification in doubt and that that doubt must be resolved in favor of the Receiver, who represents all of the creditors.

Thirtieth. That the said District Court erred, as a matter of law, in failing to differentiate between the rights of a claimant to stock fully paid for and those of a claimant to stock carried on margin, or partly paid for.

Thirty-first. That the said District Court erred, as a matter of law, in failing to find that the rules applicable to identification of
61 trust funds of money did not apply, or do not apply in the case of claims for stocks.

Thirty-second. That the said District Court erred, as a matter of law, in failing to find that the Receiver had a lien on any stocks he might hold for claimants, until the full amount of the indebtedness of claimants to the estate, was paid.

Wherefore, the said Receiver, A. Leo Everett, and the said alleged bankrupts, H. B. Hollins & Co., et al., pray that the said order of April 3rd, 1914, may be reversed.

LEXOW, MACKELLAR & WELLS,
Attorneys for Receiver.
BEEKMAN, MENKEN & GRISCOM,
Att's for H. B. Hollins & Co.

SIRS: Please take notice that the within is a copy of an Assignment of Errors this day duly filed in the within entitled matter in

the office of the Clerk of the United States District Court, Southe
District of New York.

Dated, New York, April 13, 1914.

Yours, etc.,

LEXOW, MACKELLAR & WELLS,
Attorneys for Receiver.

43 Cedar Street, Borough of Manhattan, New York City.

To Stroock & Stroock, Esqs., Attorneys for L. M. Bamberge
Cravath & Henderson, Esqs., Attorneys for Wiener, Levy & C
Hawkins, Delafield & Longfellow, Esqs., Attorneys for Arthur
Duel.

(Endorsed:) United States District Court, Southern D
62 trict of New York.—In the Matter of H. B. Hollins & C
et al., Alleged Bankrupts.—Assignment of Errors and Not
of Filing.—Lexow, Mackellar & Wells, Attorneys for Receiver,
Cedar Street, Borough of Manhattan, New York City.—Copy
ceived Apr. 16, 1914.—Cravath & Henderson, Attorneys for Wien
Levy & Co.—Copy rec'd April 16, 1914.—Stroock & Stroock, Att
L. M. Bamberger.—Copy rec'd Apl. 16, 1914.—Hawkins, Delafi
& Longfellow, Att'ys for Pet. Duel.

United States District Court, Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts.

Filed April 27, 1914.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Arthur B. Duel, Wiener, Le
& Co. and L. M. Bamberger, Greeting:

You and each of you are hereby cited and admonished to app
in the United States Circuit Court of Appeals in the Second Circ
in the City of New York, State of New York, Southern District
New York, on the 11th day of May, 1914, pursuant to the app
duly obtained and filed in the Clerk's office of the United States
trict Court, for the Southern District of New York, wher
63 you are the appellees, and A. Leo Everett, as Receiver of H.
Hollins & Co. et al., alleged bankrupts, *and H. B. Hollin
Co., et al., alleged bankrupts,* are the appellants, to show cause
any there be, why the order and decree in said appeal mentio
should not be reversed, set aside or corrected, and why speedy jus
should not be done to the parties in that behalf and to do and rec
what may appertain to justice to be done in the premises.

Witness, the Honorable Charles M. Hough, Judge of the Uni

States District Court, for the Southern District of New York, on the 13th day of April, in the year of our Lord, one thousand nine hundred and fourteen.

C. M. HOUGH,
District Judge.

(Endorsed:) In Bankruptcy No. 18935.—United States District Court, Southern District of New York.—In the Matter of Harry B. Hollins, et al., Alleged Bankrupts.—Citation on Appeal.—Lexow, Mackellar & Wells, Attorneys for Receiver, 43 Cedar Street, Borough of Manhattan, New York City.

64 United States District Court for the Southern District of New York.

Filed Apr. 27, 1914.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. AULL, ANTHONY H. WALBURG, and WALTER KUTZLEB, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.

It is hereby stipulated and agreed by and between counsel for the respective parties appearing herein that the transcript of the record of the proceedings on appeal shall consist of the following:

1. Petition of Arthur B. Duel.
2. Order to show cause.
3. Affidavit of M. G. Latimer, verified Jan. 30, 1914.
4. Answer of A. Leo Everett.
5. Answer of Wiener-Levy & Co.
6. Affidavit of C. M. Allaire, verified March 9, 1914.
7. Opinion of Hough, J.
8. Order of April 3, 1914.
9. Petition for appeal and allowance thereof.
10. Assignment of errors.

65 11. Citation.
12. This stipulation.

Dated, New York, April 22, 1914.

LEXOW, MACKELLAR & WELLS,
Attorneys for Receiver.
BEEKMAN, MENKEN & GRISCOM,
Attorneys for Alleged Bankrupts.
HAWKINS, DELAFIELD & LONGFELLOW, *Attorney- for Arthur B. Duel.*
CRAVATH & HENDERSON,
Attorneys for Wiener-Levy & Co.
STROOCK & STROOCK,
Attorneys for L. M. Bamberger.

(Endorsed:)—United States District Court, Southern District of New York.—In the Matter of H. B. Hollins & Co., et al., Alleged Bankrupts.—Stipulation.

United States District Court for the Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. Aull, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.

It is hereby stipulated and agreed by and between counsel
66 for the respective parties appearing herein, that in printing the record in the proceedings on appeal, the following corrections shall be made:

That wherever in paragraph "second" of the petition of Arthur B. Duel, the words "30th day of October, 1913" appear, said words be changed to read "30th day of October, 1912."

That in the affidavit of M. Gregg Latimer, verified the 30th day of January, 1914, the words "that on the 29th day of January, 1913, deponent served a petition," be corrected to read "that on the 29th day of January, 1914."

Dated, New York, April 30th, 1914.

LEXOW, MACKELLAR & WELLS,
Attorneys for Receiver.
BEEKMAN, MENKEN & GRISCOM,
Att'ys for Alleged Bankrupts.
HAWKINS, DELAFIELD & LONGFELLOW, *Attorneys for Arthur B. Duel.*
CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Company.
STROOCK & STROOCK,
Attorneys for L. M. Bamberger.

(Endorsed:) U. S. District Court, Southern District of New York.—In the Matter of H. B. Hollins & Co., et al., Alleged Bankrupts.—Stipulation.

67 United States District Court, Southern District of New York.

In Bankruptcy.

No. 18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. Aull, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated April 27th, 1914.

LEXOW, MACKELLAR & WELLS,
Attorneys for A. Leo Everett, Rec'r.
BEEKMAN, MENKEN & GRISCOM,
Per M.,
Attorneys for Alleged Bankrupts.
H. B. HOLLINS & CO.,
H. B. HOLLINS & BRITON N. BUSCH,
HAWKINS, DELAFIELD & LONGFELLOW, *Attorneys for Arthur B. Duel.*
CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Co.
STROOCK & STROOCK,
Attorneys for L. M. Bamberger.

68 UNITED STATES OF AMERICA,
Southern District of New York, ss:

In Bankruptcy.

#18935.

In the Matter of HARRY B. HOLLINS, BRITON N. BUSCH, JOHN A. Aull, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 1st day of May in the year of our Lord one thousand nine hundred and fourteen and of the Independence of the said United States the one hundred and thirty-eighth.

ALEX. GILCHRIST, JR., *Clerk.*

69 United States Circuit Court of Appeals for the Second Circuit, October Term, 1914.

No. 63.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts, Appellants; A. LEO EVERETT, as Receiver, etc., Petitioner-Appellant.

Argued November 12, 1914; Decided December 15, 1914.

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

Before Lacombe, Coxe, and Ward, Circuit Judges.

This cause comes here on appeal from and petition to revise an order of the District Court, Southern District of New York. Petition in bankruptcy was filed against H. B. Hollins & Company, stockbrokers on November 13th 1913. Prior to this date they had made the following purchases for customers of Amalgamated Copper stock; On October 25th, 1912, for Bamberger, 30 shares; on October 30th, 1912, for Duel, 100 shares; on February 25th, 1913, for a firm, referred to on the briefs as Wieners, 50 shares; on October 28th, 1913, for Laudau, 100 shares. On the day petition was filed Hollins & Company had "in the box," that is in their possession, 100 shares.

Of the remaining 180 shares, 30 had been hypothecated with
70 the National Bank of Commerce, 50 had been hypothecated with the Kings County Trust Company, and 100 had been used to make deliveries under "short" orders for another customer, that is had been loaned to that customer. After bankruptcy Duel and Wieners offered to pay their indebtedness on account with the bankrupts, Landau and Bamberger did not do so.

Duel petitioned for the allotment to him of 100/280ths of the 100 shares of Copper in the possession of the receiver and Wieners asked for 50/280ths thereof. The District Court granted this motion holding in effect that Landau would have been entitled to 100/280ths and Bamberger to 30/280ths had it not been for the fact that they could not recover unless they paid the amount of their debit balance to receiver, which they had not offered to do. From this decision the receiver and the bankrupts appeal.

LACOMBE, *C. J.*:

Judge Hough apparently made this disposition of the matter because he was satisfied that the decision of the Supreme Court in Gorman vs. Littlefield, 229 U. S., 19, required him to do so. He did not do so because the 100 shares in the box was identified by the testimony, for he says: "for which particular customer these 100 shares were held does not appear and cannot be ascertained." Applying what is called the "grain in a bin" theory, he reached the conclusion that all claimants to Copper stock were entitled to share ratably in

these 100 shares. Examining the record, especially the book entries in Exhibit A we find much force in the contention of appellants that at the time of the bankruptcy 50 of Landau's shares were hypothecated with the Trust Company, Duel's 100 shares had been used for delivery under a "short" order i. e. loaned to the "short" customer and 50 of Landau's shares and Wiener's 50 shares were in the box. But it is not necessary to decide that question; Landau is making no claim that this particular certificate for 100 shares is his property.

It may be noted that all four claimants are general creditors of the bankrupts and it has been repeatedly held that they merely share with all other general creditors in the assets available for such
71 creditors, except so far as they may be able to trace and identify their own individual property or its substitute or proceeds. Unless reasonably specific proof of such identification is presented, equity would seem to require that the fund for general creditors should not be depleted on any theory which has not the sanction of controlling authority.

The application of the theory followed in this case leads to this curious result. Bamberger was owing money to the bankrupts on his original purchase; his contract with them authorized them to pledge the stock bought for him. Shortly after purchase, a year before bankruptcy, the bankrupts borrowed money from the Bank of Commerce pledging his certificate for 30 shares as security. There it remained undisturbed till bankruptcy. The identity of this certificate as Bamberger's is conclusively proved, every one concedes that his 30 shares are represented by the certificate for that amount held by the bank. Nevertheless, under the theory now contended for, 30/280ths of his 30 shares is also identified as a fractional part of another certificate for 100 shares; to that extent, 30/280ths, there would be a double identification.

We are not satisfied that the decision of the Supreme Court requires the adoption of a method of identification, which may lead to such results. The statement is made that the court held in the Gorman case that: "no identification is necessary—the presumption of restitution plus the physical presence of some stock supplies the link in the absence of countervailing proof." But the facts in that case differed in a very material particular from those here presented. The bankrupt brokers in the Gorman case had bought for him 250 shares of Greene Cananea Copper, they had disposed of his original certificate, but other certificates had from time to time found their way into the box, so that when they failed they held 350 shares of that stock and were under obligations to no other customer to account for any such shares. Upon the presumption that the brokers, in the absence of proof to the contrary, did their duty, buying other shares of like kind to replace customers' shares which they had sold, identification of 250 shares, which belonged to Gorman was made out—the bankrupts had 350 shares free from any claim, except Gorman's to 250 of them. The Supreme Court says: "It is said,
72 however, that the shares in this particular case are not so identified as to come under the rule. But it does appear that at the time of the bankruptcy, certificates were found in the bank-

rupt's possession in an *amount greater* than should have been on hand for this customer and the *significant fact* is shown that *no other customer claimed any* right in those shares of stock." (Italics ours.) In the case at bar, however, there are claimants,—even leaving out Bamberger, whose certificate is conclusively identified,—to more than twice the number of shares found in the box. The facts are much the same as In re McIntyre, Petition of William Grace, 181 F. R., 960, where we held identification had not been shown. Grace claimed 200 shares of Southern Pacific stock, the bankrupts had 107 shares of that stock on hand or hypothecated and owed their cutsomers 1,651 shares of the same variety of stock. The theory now relied on was submitted with petition for certiorari in the McIntyre-Grace case, but certiorari was refused. Grace vs. Burlingham, 218 U. S., 672. We are not persuaded that the decision in the Gorman case requires a modification of the rule followed in the McIntyre-Grace case. The rights of general creditors are likely to be seriously impaired if the theory of constructive identification based on presumptions of intent be carried to the extent here asked for.

The order is reversed.

W. C. Armstrong for the Petitioner.
F. W. Longfellow and Stuart McNamara for the Respondents.

73 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms, in the Post Office Building, in the City of New York, on the 26th Day of December, One Thousand Nine Hundred and Fourteen.

Present: Hon. E. Henry Lacombe, Hon. Alfred G. Coxe, Hon. Henry G. Ward, Circuit Judges.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts, Appellants; A. LEO EVERETT, as Receiver, etc., Petitioner-Appellant.

Appeals from and Petition to Revise Order of the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

E. H. L.
A. C. C.

74 [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re H. B. Hollins et al. Order for Mandate. Unted States Circuit Court of Appeals, Second Circuit. Filed Dec. 29, 1914. William Parkin, Clerk.

75 United States Circuit Court of Appeals for the Second Circuit.

Petition for Appeal.

In the Matter of H. B. HOLLINS, BRITON N. BUSCH, JOHN A. AULL, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of the Petition of ARTHUR B. DUEL et al. for the Distribution and Apportionment to Himself and Others Entitled of 100 Shares of the Stock of Amalgamated Copper Company in the Possession of the Receiver of the Above-named Alleged Bankrupts, Respondents-Appellees.

Petition for Appeal.

Arthur B. Duel, Respondent-Appellee, above-named, conceiving himself aggrieved by the decree made and entered herein on the 29th day of December, 1914, does hereby appeal from the said decree of the Circuit Court of Appeals for the Second Circuit reversing the final order of the United States District Court for the Southern District of New York, entered on the 3rd day of April, 1914, to the Supreme Court of the United States for the reasons specified in the assignment of errors as filed herein, and he prays that this
76 appeal may be allowed and that the transcript of the record, proceedings and papers upon which the said decree was made duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, January 15th, 1915.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Arthur B. Duel, Respondent-Appellee.

Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, New York City, N. Y.

77 The foregoing claim of appeal is allowed and all proceedings herein in the Court below and by the alleged bankrupts or their receiver in respect of said 100 shares of Amalgamated Copper Company stock are stayed pending the decision of said appeal in the Supreme Court of the United States.

Dated, New York, Jan. 15th, 1915.

ALFRED C. COXE,
United States Circuit Judge.

78 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. In the Matter of H. B. Hollins, et al., Alleged Bankrupts, Petitioners-Appellants. In the Matter of the Petition of Arthur B. Duel, et al., for the distribution, etc., of 100 shares of the stock, etc., in the possession of the Receiver, etc., Respondents-Appellees. Petition for Appeal and Allowance. Hawkins, Delafield

& Longfellow, Attorneys for Arthur B. Duel, Respondent-Appellee, Office and P. O. Address 20 Exchange Place, Borough of Manhattan, New York. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1915. William Parkin, Clerk.

79 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of H. B. Hollins, Briton N. Busch, John A. Aull, Anthony H. Walburg, and Walter Kutzleb, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of the Petition of Arthur B. Duel et al. for the Distribution and Apportionment to Himself and Others Entitled of 100 Shares of the Stock of Amalgamated Copper Company in the Possession of the Receiver of the Above-named Alleged Bankrupts, Respondents-Appellees.

Assignment of Errors.

Assignment of Errors.

And now on this 15th day of January, 1915, comes respondent-appellee, Arthur B. Duel, by Hawkins, Delafield & Longfellow, his attorneys and says: That in the decree of the United States Circuit Court of Appeals for the Second Circuit, entered on the 29th day of December, 1914, reversing the final order of the District Court of the United States for the Southern District of New York, entered on the 3rd day of April, 1914, there was manifest error in this, to wit:

80 First. The Court erred in holding that respondents-appellees, Arthur B. Duel and Weiner, Levy & Co. were not entitled to 100/280ths or 5/14ths of the 100 shares of Amalgamated Company stock as claimed and allowed in the Court below.

Second. The Court erred in holding that H. B. Hollins, et al., alleged bankrupts, and A. Leo Everett as Receiver in bankruptcy of the property and effects of said alleged bankrupts, were entitled to the whole of the 100 shares of Amalgamated Copper Company stock.

Third. The Court erred in holding that Arthur B. Duel was not entitled to 100/280ths or 5/14th of the 100 shares of Amalgamated Copper Company stock.

Fourth. The Court erred in holding that Arthur B. Duel was not entitled to any interest other than as a general creditor in the 100 shares of Amalgamated Copper Company stock.

Fifth. The Court erred in holding that Arthur B. Duel did not sufficiently identify in law his 100 shares or part thereof, of Amalgamated Copper Company stock.

Sixth. The Court erred in holding that Arthur B. Duel did not sufficiently identify in law the 100/280ths or 5/14ths interest in the Amalgamated Copper Company stock.

Seventh. The Court erred in holding that Arthur B. Duel was not entitled to recover 100/280ths or 5/14ths interest in the 100 shares

of Amalgamated Copper Company stock without specific proof of other character, or further identification than that accepted in the Court below.

81 Eighth. The Court erred in holding that Arthur B. Duel was not entitled to recover of the Receiver 5/14ths of any dividends which had been received by said Receiver on the said 100 shares of the Amalgamated Copper Company stock as allowed by the Court below.

Ninth. The Court erred in holding that the decree of the Court below, awarding to Arthur B. Duel a 100/280ths or 5/14ths interest in the 100 shares of Amalgamated Copper Company stock operated to deplete the fund belonging to the general creditors of the alleged bankrupts.

Tenth. The Court erred in holding that where there is more than one claimant for whom the bankrupts were carrying Amalgamated Copper stock, and at the time of bankruptcy an amount of such stock is found on the bankrupts' premises not allocated to any particular account but insufficient to supply in full the demands of all such claimants entitled to said stock, such claimants cannot take of the Receiver a pro rata allotment and distribution of such stock so found but must be converted into general creditors for the value of their stock.

Eleventh. The Court erred in holding that the said 100 shares of Amalgamated Copper Company stock which the alleged bankrupts held on November 13, 1913, were not held for account pro rata of all of the customers of said bankrupts "long" of said stock who were entitled thereto.

Twelfth. The Court erred in reversing the said order of the District Court for the Southern District of New York.

82 Thirteenth. The Court erred in not affirming the said order of the District Court for the Southern District of New York.

Wherefore said Arthur B. Duel prays that the decree of the Circuit Court of Appeals for the Second Circuit be reversed.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Arthur B. Duel, Respondent-Appellee.

Office & P. O. Address: 20 Exchange Place, Borough of Manhattan, New York, N. Y.

83 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. In the Matter of H. B. Hollins, et al., Alleged Bankrupts, Petitioners-Appellants. In the Matter of the Petition of Arthur B. Duel, et al., for the distribution, etc., of 100 shares of the stock, etc., in the possession of the Receiver, etc., Respondents-Appellees. Assignment of Errors. Hawkins, Delafield & Longfellow, Attorneys for Arthur B. Duel, Respondent-Appellee, Office and P. O. Address, 20 Echange Place, Borough of Manhattan, New York. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1915. William Parkin, Clerk.

84 In the Supreme Court of the United States.

ARTHUR B. DUEL and WIENER, LEVY & COMPANY, Appellants,
against
HARRY B. HOLLINS and Others, Alleged Bankrupts, and A. LEO EVERETT, Receiver, Appellees.

UNITED STATES OF AMERICA,
Southern District of New York,
in the Second Circuit, ss:

Know all men by these presents: That we, Arthur B. Duel as principal, and New England Casualty Company, by Walter Worth, Attorney in fact as surety, are held and firmly bound unto Harry B. Hollins and others trading as Harry B. Hollins & Co. and A. Leo Everett, Receiver, for the full and just sum of Two Hundred and Fifty dollars ($250.00/100), for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of January, 1915.

Whereas, lately, to-wit, on the 29th day of December, 1914, in the United States Circuit Court of Appeals for the Second Circuit, in an appeal then pending from the United States District Court for the Southern District of New York, wherein Harry B. Hollins and others, alleged bankrupts, and A. Leo Everett, Receiver, were appellants, and Arthur B. Duel and Weiner, Levy & Company were appellees, an order was entered, dated December 29th, 1914,
85 reversing the final order in said proceeding in said District Court; and

Whereas, said appellants, Arthur B. Duel and Weiner, Levy & Company, have been duly allowed an appeal from the said order of said United States Circuit Court of Appeals to the Supreme Court of the United States, and have filed a copy thereof in the office of the Clerk of the said United States Circuit Court,

Now, the condition of the above obligation is
M. G. L., W. W. such that if the said appellant, Arthur B. Duel, prosecute their said appeal to effect and shall answer all costs if they shall fail to make the said appeal good, this obligation to be void; otherwise to remain in full force and effect.

[SEAL.] ARTHUR B. DUEL,
By M. GREGG LATIMER,
Attorney-in-Fact.

[SEAL.] NEW ENGLAND CASUALTY CO.,
By WALTER WORTH, *Att'y-in-Fact.*

Taken and acknowledged, sealed and delivered this 15th day of January, 1915, before me.

MAX ROCKMORE,
Notary Public, Kings Co.

Certificate filed in New York Co.

Approved as to form, amount and sufficiency, the same to operate as a supersedeas.
Dated, January 15th, 1915.

ALFRED C. COXE,
United States Circuit Judge.

Approved as re-executed and ordered on file as of January 15th, 1915.

ALFRED C. COXE, *U. S. J.*

Taken and acknowledged before me 6th day of February, 1915.
[SEAL.] MAX ROCKMORE,
Notary Public, Kings County.

Certificate filed N. Y. Co.

86 STATE OF NEW YORK,
County of New York, ss:

On this 15th day of January, 1915, before me personally appeared Walter Worth, Attorney-in-fact of the New England Casualty Company, with whom I am personally acquainted, who being by me duly sworn, said: that he resides in the State of New York; that he is *a* attorney-in-fact of the New England Casualty Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said company; and that he signed his name thereto as Attorney-in-fact by like authority; and the said Walter Worth further says that the liabilities of the said Company do not exceed its assets, as ascertained in the manner provided in Chapter 33 of the Laws of 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York, and known as the Insurance Law.

[SEAL.] JAMES E. SWEENEY,
Notary Public, Kings County, No. 138.

Certificate filed in New York County Clerk's Office No. 142; Bronx County Clerk's Office No. 24, Queens County Clerk's Office No. 573, West Chester County Clerk's Office.

At an adjourned special meeting of the Stockholders of the New England Casualty Company, duly called and held at the office of the Company, in the City of Boston, Massachusetts, on the 18th day of September, 1911, a quorum being present, the following By-Law was duly adopted: Art. XVI, Section 1.

"All bonds, recognizances, or contracts of indemnity, policies of insurance and other writings obligatory in the nature thereof shall be signed by the President, First Vice President, Vice President, Resident Vice President or Attorney-in-fact, and except when signed by an Attorney-in-fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, Assistant Secretary or Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, Walter Worth, Attorney-in-fact of the New England Casualty Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a correct and true transcript therefrom and of the whole of Article XVI, Section 1, of said original By-Law.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Company, at the City of New York, this 15th day of January, 1915.

WALTER WORTH,
Attorney-in-Fact.

87 *Power of Attorney.*

New England Casualty Company.

Home Office, Boston, Massachusetts.

[Seal New England Casualty Company, Boston, Mass., Incorporated 1901.]

Know all Men by these Presents:

That the New England Casualty Company, by Edward W. Briggs, its Vice President, and William J. Lewis, its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company at a regular meeting of that body held on the 21st day of December, 1911, a copy of which is hereto attached, does hereby nominate, constitute and appoint Walter Worth, of New York, New York, its true and lawful agent and attorney-in-fact, to make, execute, seal and deliver for and on its behalf as surety, and as its act and deed, any and all bonds, recognizances, or undertakings for or on behalf of the Company, the amount of any one bond, however, not to exceed the sum of twenty-five thousand ($25,000) dollars. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company, at its office in Boston, Mass., in their own proper persons.

In witness whereof, the said Edward W. Bgirgs, Vice-President, and William J. Lewis, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said New England Casualty Company, this third day of December, A. D. 1914.

Tax paid on original.

[SEAL.] EDWARD W. BRIGGS,
Vice-President.

Attest:
WM. J. LEWIS,
Assistant Secretary.

At a regular meeting of the Board of Directors of the New England Casualty Company, held in its office in the City of Boston, Commonwealth of Massachusetts, on the 21st day of December, 1911, the following resolution was unanimously adopted, to wit:

"Whereas, it frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, which, for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore be it resolved, that the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

I, William J. Lewis, Assistant Secretary, of the New England Casualty Company, hereby certify that the aforegoing is a true copy taken from the Records of Proceedings of the Board of Directors of the New England Casualty Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the New England Casualty Company, this third day of December, A. D. 1914.

[SEAL.] WM. J. LEWIS,
Assistant Secretary.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this third day of December, A. D. 1914, before the subscriber, a Notary Public of the Commonwealth of Massachusetts, in and for the City of Boston, duly commissioned and qualified, came Edward W. Briggs, Vice-President, and William J. Lewis, Assistant Secretary, of the New England Casualty Company, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Boston, the day and year first above written.

[SEAL.] GEORGE P. FOGUS,
Notary Public, Notary Public.

My commission expires Oct. 2, 1918.

88 (Endorsed:) In the Supreme Court of the United States. Arthur B. Duel and Wiener, Levy & Company, Appellants,

against Harry B. Hollins and others, alleged bankrupts, and A. Leo Everett, Receiver, Appellees. Bond on Appeal to the Supreme Court of the United States. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1915. William Parkin, Clerk.

89 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of ARTHUR B. DUEL et al., Seeking to Reclaim, and Praying for the Distribution and Apportionment to Themselves and Others Entitled of One Hundred Shares of the Capital Stock of Amalgamated Copper Company in Possession of the Receiver of the Above-named Alleged Bankrupts, Respondents-Appellees.

Petition for Appeal.

Wiener, Levy & Co., respondents-appellees above-named, conceiving themselves aggrieved by the decree made and entered herein on the 29th day of December, 1914, do hereby appeal from the said decree of the Circuit Court of Appeals for the Second Circuit reversing the final order of the United States District Court for the Southern District of New York, to the Supreme Court of the United States, for the reasons specified in the assignment of errors as filed herein, and they pray that this appeal may be allowed and that the transcript of the record, proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated New York, January 15, 1915.

CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Co.

Office & Postoffice Address, 52 William Street, Borough of Manhattan, New York City.

90 The foregoing claim of appeal is allowed and all proceedings herein in the court below and by the alleged bankrupts or their receiver in respect of the interest in said one hundred shares of Amalgamated Copper Company stock claimed by said Duel and Wiener, Levy & Co., are stayed pending the decision of said appeal in the Supreme Court of the United States.

Dated New York, January 15th, 1915.

ALFRED C. COXE,
U. S. Circuit Judge.

91 SIRS: Please take notice that the within is a petition for appeal this day duly filed in the within entitled matter in the office of the Clerk of the United States Circuit Court of Appeals

for the Second Circuit, in the Court House, Post Office Building, Borough of Manhattan, New York City.

Dated New York, January 15, 1915.

Yours, &c.,

CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Company,
Respondents-Appellees.

To Messrs. Beekman, Menken & Griscom, Attorneys for H. B. Hollins & Co., Alleged Bankrupts; Lexow, Mackellar & Wells, Attorneys for A. Leo Everett, Receiver.

Service of the foregoing petition for appeal, of the allowance thereof, and stay, and copies thereof, acknowledged this 15th day of January, 1915.

BEEKMAN, MENKEN & GRISCOM,
Attorneys for H. B. Hollins & Co., Alleged Bankrupts.
LEXOW, MACKELLAR & WELLS,
Attorneys for A. Leo Everett, Receiver.

92 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. In the Matter of Harry B. Hollins, et al., Alleged Bankrupts, Petitioners-Appellants, against In the Matter of Arthur B. Duel, et al., etc., Respondents-Appellee. Petition for Appeal & Allowance. Cravath & Henderson, Attorneys for Wiener, Levy & Co., No. 52 William Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1915. William Parkin, Clerk.

93 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of Harry B. Hollins et al., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of Arthur B. Duel et al., Seeking to Reclaim and Praying for the Distribution and Apportionment to Themselves and Others Entitled of One Hundred Shares of the Capital Stock of Amalgamated Copper Company in Possession of the Receiver of the Above-named Alleged Bankrupts, Respondents-Appellees.

Assignment of Errors.

Assignment of Errors.

And now, on the 15th day of January, 1915, come respondents-appellees Wiener, Levy & Co. by Cravath & Henderson, their attorneys, and say that in the decree of the United States Circuit Court of Appeals for the Second Circuit entered on the 29th day of December, 1914, reversing the final order of the District Court of the United States for the Southern District of New York entered on the 3rd day of April, 1914, there was manifest error in this, to-wit:

First. The court erred in holding that respondents-appellees Wiener, Levy & Co., were not entitled to share pro rata with others similarly entitled, in the 100 shares of Amalgamated Copper Company stock as claimed and allowed in the court below.

Second. The court erred in holding that Harry B. Hollins
94 et al., alleged bankrupts, and A. Leo Everett, as receiver in bankruptcy of the property and effects of said alleged bankrupts, were entitled to the whole of the said 100 shares of Amalgamated Company stock.

Third. The court erred in holding that Wiener, Levy & Co. were not entitled to 50/280ths or 5/28ths of the said 100 shares of Amalgamated Copper Company stock.

Fourth. The court erred in holding that Wiener, Levy & Co. were not entitled to recover of the receiver 5/28ths of any dividends which had been received by said receiver on the said 100 shares of Amalgamated Copper Company stock, as allowed in the court below.

Fifth. The court erred in holding that Wiener, Levy & Co. were not entitled to any interest other than as general creditors in the said 100 shares of Amalgamated Copper Company stock.

Sixth. The court erred in holding that Wiener, Levy & Co. did not sufficiently identify in law their 50 shares, or part thereof, of said Amalgamated Copper Company stock.

Seventh. The court erred in holding that Wiener, Levy & Co. did not sufficiently identify in law a 50/280th- or 5/28ths interest in the said 100 shares of Amalgamated Copper Company stock.

Eighth. The court erred in holding that Wiener, Levy & Co. were not entitled to recover a 50/280th or 5/28th interest in the said 100 shares of Amalgamated Copper Company stock without specific proof of other or further identification than that accepted in the court below.

Ninth. The court erred in holding that the decree of the court below awarding Wiener, Levy & Co. a 5/28th interest in
95 the said 100 shares of Amalgamated Copper Company stock operated to deplete the fund belonging to the general creditors of the alleged bankrupts.

Tenth. The court erred in holding that where there is more than one claimant for whom the bankrupts were carrying Amalgamated Copper Company stock and at the time of bankruptcy an amount of said stock is found on the bankrupts' premises, not allocated to any particular account, but insufficient to supply in full the demand of all such claimants entitled to such stock, such claimants cannot take of the receiver a pro rata allotment and distribution of said stock so found, but must be converted into general creditors for the value of their stock.

Eleventh. The court erred in holding that the said 100 shares of Amalgamated Copper Company stock, which the alleged bankrupts held on November 13, 1913, were not held for account pro rata of all of the customers of said bankrupts "long" of said stock who were entitled thereto.

Twelfth. The court erred in reversing the said order of the District Court of the United States for the Southern District of New York.

Thirteenth. The court erred in not affirming the said order of the District Court of the United States for the Southern District of New York.

Wherefore said Wiener, Levy & Co. pray that the said decree of the United States Circuit Court of Appeals for the Second Circuit be reversed.

CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Co.,
Respondents-Appellees.

Office & Post Office Address, 52 William Street, Borough of Manhattan, New York City.

96 Please take notice that the within is a copy of an assignment of errors this day duly filed in the within entitled matter in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit Court in the Court House, Post Office Building, Borough of Manhattan, New York City.

Dated New York, January 15, 1915.

Yours, &c.,

CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Co.,
Respondents-Appellees.

To Messrs. Beekman, Menken & Griscom, Attorneys for H. B. Hollins & Co., Alleged Bankrupts.
Messrs. Lexow, Mackellar & Wells, Attorneys for A. Leo Everett, Receiver.

Service of the foregoing assignment of errors and a copy thereof acknowledged this 15 day of January, 1915.

BEEKMAN, MENKEN & GRISCOM,
Att'ys for Alleged Bankrupts.
LEXOW, MACKELLAR & WELLS,
Att'ys for Receiver.

97 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. In the Matter of Harry B. Hollins, et al., alleged Bankrupts, Petitioners-Appellants, against In the Matter of Arthur B. Duel, et al., etc., Respondents-Appellees. Assignment of errors. Copy. Cravath & Henderson, Atorneys for Respts.-Appellees, No. 52 William Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1915. William Parkin, Clerk.

98 In the Supreme Court of the United States.

ARTHUR B. DUEL and WIENER, LEVY & COMPANY, Appellants,
against
HARRY B. HOLLINS and Others, Alleged Bankrupts, and A. LEO EVERETT, Receiver, Appellees.

UNITED STATES OF AMERICA,
Southern District of New York,
In the Second Circuit, ss:

Know wall men by these presents: That we, Wiener, Levy & Company by Stuart McNamara, attorney in fact, as principal, and New England Casualty Company, by Walter Worth, attorney in fact, as surety, are held and firmly bound unto Harry B. Hollins and others trading as Harry B. Hollins & Co. and A. Leo Everett, Receiver, for the full and just sum of Two hundred fifty dollars ($250.00), for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of January, 1915.

Whereas, lately, to-wit, on the 29th day of December, 1914, in the United States Circuit Court of Appeals for the Second Circuit, in an appeal then pending from the United States District Court for the Southern District of New York, wherein Harry B. Hollins and others, alleged bankrupts, and A. Leo Everett, Receiver, were appellants, and Arthur B. Duel and Wiener, Levy & Company
99 were appellees, an order was entered, dated December 29, 1914, reversing the final order in said proceeding in said District Court; and

Whereas, said appellants, Arthur B. Duel and Wiener, Levy & Company, have been duly allowed an appeal from the said order of said United States Circuit Court of Appeals to the Supreme Court of the United States, and have filed a copy thereof in the office of the Clerk of the said United States Circuit Court,

Now, the condition of the above obligation is such that if the said appellants, Wiener, Levy & Company, prosecute their said appeal to effect and shall answer all costs if they shall fail to make the said appeal good, this obligation to be void; otherwise to remain in full force and effect.

[SEAL.] WIENER, LEVY & COMPANY,
By STUART McNAMARA, *Att'y-in-Fact.*
NEW ENGLAND CASUALTY CO.,
By WALTER WORTH,
Attorney-in-Fact.

Taken and acknowledged, sealed and delivered this 15th day of January, 1915, before me.

[SEAL.] MAX ROCKMORE,
Notary Public, Kings Co.

Certificate filed in New York Co.

Approved as to form, amount and sufficiency, the same to operate as a supersedeas.

Dated January 15, 1915.

ALFRED C. COXE,
United States Circuit Judge.

100 *Power of Attorney.*

New England Casualty Company.

Home Office, Boston, Massachusetts.

[Seal New England Casualty Company, Boston, Mass, Incorporated 1901.]

Know all Men by these Presents:

That the New England Casualty Company, by Edward W. Briggs, its Vice President, and William J. Lewis, its Assistant Secretary, in pursuance of a certain resolution duly passed by the Board of Directors of said Company at a regular meeting of that body held on the 21st day of December, 1911, a copy of which is hereto attached, does hereby nominate, constitute and appoint Walter Worth, of New York, New York, its true and lawful agent and attorney-in-fact, to make, execute, seal and deliver for and on its behalf as surety, and as its act and deed, any and all bonds, recognizances, or undertakings for or on behalf of the Company, the amount of any one bond, however, not to exceed the sum of twenty-five thousand ($25,000) dollars. And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company, at its office in Boston, Mass., in their own proper persons.

In witness whereof, the said Edward W. Briggs, Vice-President, and William J. Lewis, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said New England Casualty Company, this third day of December, A. D. 1914.

Tax paid on original.

[SEAL.] EDWARD W. BRIGGS,
Vice-President.

Attest:
WM. J. LEWIS,
Assistant Secretary.

At a regular meeting of the Board of Directors of the New England Casualty Company, held in its office in the City of Boston, Commonwealth of Massachusetts, on the 21st day of December, 1911, the following resolution was unanimously adopted, to wit:

"Whereas, it frequently becomes necessary for a representative of the Company to execute a bond on behalf of the Company, which, for lack of time or some other cause, it is impossible to have executed by the regularly elected officers of the Company;

Therefore be it resolved, that the President, or either of the Vice-Presidents, by and with the concurrence of the Secretary or Assistant Secretary, is hereby authorized to empower any representative of the Company to execute, on behalf of the Company, any bond which the Company might execute through its duly elected officers."

I, William J. Lewis, Assistant Secretary, of the New England Casualty Company, hereby certify that the aforegoing is a true copy taken from the Records of Proceedings of the Board of Directors of the New England Casualty Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the New England Casualty Company, this third day of December, A. D. 1914.

[SEAL.] WM. J. LEWIS,
Assistant Secretary.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On this third day of December, A. D. 1914, before the subscriber, a Notary Public of the Commonwealth of Massachusetts, in and for the City of Boston, duly commissioned and qualified, came Edward W. Briggs, Vice-President, and William J. Lewis, Assistant Secretary, of the New England Casualty Company, to me personally known to be the individuals and officers described in, and who executed, the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Boston, the day and year first above written.

[SEAL.] GEORGE P. FOGUS,
Notary Public, Notary Public.

My commission expires Oct. 2, 1919.

101 STATE OF NEW YORK,
County of New York, ss:

On this 15th day of January, 1915, before me personally appeared Walter Worth, Attorney-in-fact of the New England Casualty Company, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the State of New York; that he is Attorney-in-fact of the New England Casualty Company, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said company; and that he signed his name thereto as Attorney-in-fact by like authority;

and the said Walter Worth further says that the liabilities of the said Company do not exceed its assets, as ascertained in the manner provided in Chapter 33 of the Laws of 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York, and known as the Insurance Law.

[SEAL.]

JAMES E. SWEENEY,
Notary Public, Kings County No. 133.

Certificates filed in New York County Clerk's Office No. 142, Bronx County Clerk's Office No. 24, Queen's County Clerk's Office No. 673, Westchester County Clerk's Office.

At an adjourned special meeting of the Stockholders of the New England Casualty Company, duly called and held at the office of the Company, in the City of Boston, Massachusetts, on the 18th day of September, 1911, a quorum being present, the following By-Law was duly adopted: Art. XVI, Section 1.

"All bonds, recognizances, or contracts of indemnity, policies of insurance and other writings obligatory in the nature thereof shall be signed by the President, First Vice President, Vice President, Resident Vice President or Attorney-in-fact, and except when signed by an Attorney-in-fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, Assistant Secretary or Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, Walter Worth, Attorney-in-fact of the New England Casualty Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a correct and true transcript therefrom and of the whole of Article XVI, Section 1, of said original By-Law.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Company, at the City of New York, this 15th day of January, 1915.

WALTER WORTH,
Attorney-in-Fact.

102 (Endorsed:) In the Supreme Court of the United States. Duel et al. v. Hollins et al. Cost bond on appeal of appellant. Wiener, Levy & Co. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1915. William Parkin, Clerk.

103 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of ARTHUR B. DUEL and WIENER, LEVY & COMPANY, Seeking to Reclaim, etc., Respondents-Appellees.

Præcipe and Stipulation.

To the Clerk of the United States Circuit Court of Appeals for the Second Circuit:

You will please prepare the transcript of the record in this cause, to be filed in the office of the Clerk of the Supreme Court of the United States under an appeal heretofore perfected to said Court, and include in said transcript the following papers and portions of the record:

1. Petition of Arthur B. Duel, verified January 28, 1914, with exhibits;
2. Order to show cause of the United States District Court for the Southern District of New York, March 2, 1914;
3. Affidavit of M. Gregg Latimer, verified January 30, 1914;
4. Answer of A. Leo Everett, Receiver, verified February 28, 1914;
5. Answer of Wiener, Levy & Co., verified March 12, 1914;
6. Affidavit of Charles M. Allaire, verified March 9, 1914, and exhibits;
7. Opinion of Hough, J., United States District Court, Southern District of New York, dated March 23, 1914;

104 8. Order of United States District Court entered April 3, 1914;

9. Petition of A. Leo Everett, Receiver, and H. B. Hollins & Co., alleged bankrupts, for appeal from United States District Court for the Southern District of New York to United States Circuit Court of Appeals for the Second Circuit, and allowance thereof;
10. Assignment of errors on said appeal;
11. Stipulation as to record in United States Circuit Court of Appeals, dated April 22, 1914;
12. Stipulation as to amendments and record, dated April 30, 1914, and April 27, 1914, respectively;
13. Certificate of Clerk, dated May 1, 1914;
14. Opinion of United States Circuit Court of Appeals, dated ——, 1914;
15. Order of United States Circuit Court of Appeals, dated December 29, 1914;
16. Petition of Arthur B. Duel and Wiener, Levy & Co. for appeal from said order to the Supreme Court, allowance thereof, and Stay;
17. Assignment of errors;
18. Citation;

19. This præcipe, with acceptance, and stipulation annexed.

Said transcript which eliminates all papers not necessary to the consideration of the questions to be reviewed to be prepared as required by law and the rules of this Court, and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the said Supreme Court, at Washington, D. C., on or before February 17, 1915.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Arthur B. Duel.
CRAVATH & HENDERSON,
Attorneys for Wiener, Levy & Co.

105 Due and timely service of the above præcipe and of a copy thereof is hereby admitted, and it is stipulated that all papers not designated in the above schedule shall be eliminated from the transcript to be prepared on appeal, and that the above designation includes all papers and portions of the record necessary to the consideration of the questions to be reviewed; and that the foregoing printed copy is a true transcript of the record in the above-entitled matter as agreed upon by the parties hereto.

Dated, New York, January 20, 1915.

BEEKMAN, MENKEN & GRISCOM,
Attorneys for H. B. Hollins & Co., Alleged Bankrupts.
LEXOW, MACKELLAR & WELLS,
Attorneys for A. Leo Everett, Receiver.

Certificate of Clerk.

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages numbered 1 to 105, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the matter of Harry B. Hollins & Co., et al., and A. Leo Everett, Receiver, petitioners-appellants, and Arthur B. Duel and Wiener, Levy & Company, respondents-appellees, as agreed upon by the parties.

106 In testimony whereof, I have caused the seal of the said Court to be hereunto affixed in the Borough of Manhattan, in the City of New York, Southern District of New York, in the second Circuit, this 25th day of January, in the year of our Lord One thousand nine hundred and fifteen and of the Independence of the United States the One hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1/25/15. W. P.]

107 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of ARTHUR B. DUEL and WIENER, LEVY & COMPANY, Seeking to Reclaim, etc., Respondents-Appellees.

Citation.

The President of the United States to Harry B. Hollins, Briton N. Busch, Walter Kutzleb, John A. Aull, and Anthony Walburg, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts, and A. Leo Everett, Receiver, Greetings:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, in the Court House, in the Post Office Building, Borough of Manhattan, New York City, wherein Arthur B. Duel and Wiener, Levy & Company are appellants and you are appellees, to show cause, if any there be, why the order in said appeal mentioned should not be reversed and the errors therein mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Alfred C. Coxe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit,
108 in the Borough of Manhattan, New York City, Southern District of New York, in the Second Circuit, this 18th day of January, in the year of our Lord One thousand nine hundred and fifteen, and of the Independence of the United States One hundred and thirty-ninth.

ALFRED C. COXE,
United States Circuit Judge.

We hereby acknowledge that the above Citation on appeal was served upon us the 18th day of January, 1915.

BEEKMAN, MENKEN & GRISCOM,
Attorneys for H. B. Hollins & Co.
LEXOW, MACKELLAR & WELLS,
Attorneys for A. Leo Everett, Rec'r.

109 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. In the Matter of Harry B. Hollins, et al., Alleged Bankrupts, Petitioners-Appellants. In the Matter of Arthur B. Duel and Weiner, Levy & Company, seeking to reclaim, etc., Respondents-Appellees. Citation. Original. Hawkins, Delafield & Longfellow, Attorneys for Arthur B. Duel, Respondent-Appellee, Office and P. O. Address, 20 Exchange Place, Borough of Manhattan,

New York. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 19, 1915. William Parkin, Clerk.

110 United States Circuit Court of Appeals for the Second Circuit.

In the Matter of HARRY B. HOLLINS et al., Alleged Bankrupts, Petitioners-Appellants.

In the Matter of ARTHUR B. DUEL and WIENER, LEVY & COMPANY, Seeking to Reclaim, etc., Respondents-Appellees.

Citation.

The President of the United States to Harry B. Hollins, Briton N. Busch, Walter Kutzleb, John A. Aull, and Anthony Walburg, as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts, and A. Leo Everett, Receiver, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Second Circuit, in the Court House, in the Post Office Building, Borough of Manhattan, New York City, wherein Arthur B. Duel and Wiener, Levy & Company are appellants and you are appellees, to show cause, if any there be, why the order in said appeal mentioned should not be reversed and the errors therein mentioned should not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable Alfred C. Coxe, one of the Judges of the United States Circuit Court of Appeals for the Second Circuit,
111 in the Borough of Manhattan, New York City, Southern District of New York, in the Second Circuit, this 18th day of January, in the year of our Lord One thousand nine hundred and fifteen, and of the Independence of the United States the One hundred and thirty-ninth.

ALFRED C. COXE,
United States Circuit Judge.

Service of the within and foregoing Citation, and of a copy thereof, acknowledged this 18th day of January, 1915.

BEEKMAN, MENKEN & GRISCOM,
Attorneys for Harry B. Hollins, Briton N. Busch, Walter Kutzleb, John A. Aull, and Anthony Walburg, as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts.
LEXOW, MACKELLAR & WELLS,
Attorneys for A. Leo Everett, Receiver.

112 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. In the Matter of Harry B. Hollins et al.,

Petitioners-Appellants, *against* In the Matter of Arthur B. Duel, et al., etc., Respondents-Appellees. Citation. Cravath & Henderson, Attorneys for Wiener, Levy & Co., No. 52 William Street, Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 21, 1915. William Parkin, Clerk.

Endorsed on cover: File No. 24,563. U. S. Circuit Court Appeals, 2d Circuit. Term No. 352. Arthur B. Duel, appellant, vs. Harry B. Hollins et al., individually and as members of the firm of H. B. Hollins & Co., alleged bankrupts, and A. Leo Everett, receiver. File No. 24,564. Term No. 353. Wiener, Levy & Co., appellants, vs. Harry B. Hollins et al., individually and as members of the firm of H. B. Hollins & Co., alleged bankrupts, and A. Leo Everett, receiver. Filed February 17th, 1915. File Nos. 24,563 and 24,564.

Supreme Court of the United States,

OCTOBER TERM, 1915.

ARTHUR B. DUEL, APPELLANT,

vs.

HARRY B. HOLLINS *et al.*, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER, — No. 352

WIENER, LEVY & CO., APPELLANTS,

vs.

HARRY B. HOLLINS *et al.*, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER. — No. 353

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief on Behalf of Arthur B. Duel, Appellant.

HAWKINS, DELAFIELD & LONGFELLOW,
Attorneys for Appellant,
ARTHUR B. DUEL.

LEWIS L. DELAFIELD,
FREDERICK W. LONGFELLOW,
Of Counsel.

B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

SUBJECT INDEX.

came into the possession of the Receiver of H. B. Hollins & Co., alleged bankrupts, who were stock brokers, doing business in the City of New York. The appellant, Arthur B. Duel, a customer of said firm, claims to be the owner of an undivided 100/280ths interest (35.714 shares) in said 100 shares of stock, and the appellants, Weiner, Levy & Co., who were also customers, claim to be the owners of an undivided 50/280ths interest (17.857 shares) in the stock. The appellant Duel instituted proceedings in the District Court for the Southern District of New York to recover or reclaim the proportionate share of said 100 shares claimed as above (making parties all persons who could have any interest in the stock in question), and the appellants, Weiner, Levy & Co. by answer filed in the proceeding instituted by Duel, likewise asserted their claim as above. The District Court ordered the Receiver to deliver to the claimants, Duel and Weiner, Levy & Co., the full shares claimed, together with moneys sufficient to adjust fractional shares and dividends, and from that order the Receiver and the alleged bankrupts appealed to the Circuit Court of Appeals for the Second Circuit, which Court reversed the order of the District Court, thus denying to the appellants the relief claimed, and granted to them by the District Court. The following papers were before the District Court:

1. Petition of Duel, verified January 28, 1914 (Record, pp. 1-6);
2. The order to show cause of the Hon. Julius M. Mayer, District Judge, granted upon said petition (Record, pp. 6-7);
3. The affidavit of service of petition and order to show cause, verified January 30, 1914 (Record, p. 8);

4. The answer of A. Leo Everett, the Receiver, verified February 28, 1914 (Record, pp. 8-9);
5. The answer of Weiner, Levy & Co., verified March 12, 1914 (Record, pp. 10-15);
6. The affidavit of Charles M. Allaire, verified March 9, 1914 (Record, pp. 16-20, and exhibits marked 37-41).

The petition and order to show cause were duly served on Weiner, Levy & Co., L. M. Bamberger and Hugo Landau (who, together with the petitioner-appellant Duel, were concededly the only persons who could claim the right to reclaim any part of said 100 shares of stock), in accordance with the directions contained in the order to show cause; and all of the parties named appeared in this proceeding, except Landau. (Record, p. 23)

The question involved in this appeal from the order of the Circuit Court of Appeals for the Second Circuit is whether a number of customers of a stock broker who are "long" of a particular stock, *i. e.* for whom the stock broker is obligated to carry stock, can claim *pro rata* against the stock of that character found in the possession of the broker on the date of bankruptcy free of pledge, where such stock is insufficient to satisfy their demands in full. The District Judge being of the opinion that the principles announced by this Court in *Gorman* v. *Littlefield*, 229 U. S. 19, and preceding decisions, sustained the petitioner's contention, under the facts as appearing in the record, held in favor of such *pro rata* distribution; while the Circuit Court of Appeals for the Second Circuit, not being so satisfied, reversed the order of the District Court; and from this order both Duel and Weiner, Levy & Co. have appealed to this Court.

SPECIFICATIONS OF ERROR STATING IN WHICH RESPECTS THE ORDER OF THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT IS ALLEGED TO BE ERRONEOUS.

On this appeal the appellant Duel charges thirteen separate errors (Record, pp. 40-41). They are as follows:

First.—The Court erred in holding that respondents-appellees, Arthur B. Duel and Weiner, Levy & Co. were not entitled to share *pro rata* in the 100 shares of Amalgamated Copper Co. stock as claimed and allowed in the Court below.

Second.—The Court erred in holding that H. B. Hollins, *et al.*, alleged bankrupts, and A. Leo Everett as Receiver in bankruptcy of the property and effects of said alleged bankrupts, were entitled to the whole of the 100 shares of Amalgamated Cooper Company stock.

Third.—The Court erred in holding that Arthur B. Duel was not entitled to 100/280ths or 5/14ths of the 100 shares of Amalgamated Copper Company stock.

Fourth.—The Court erred in holding that Arthur B. Duel was not entitled to any interest other than as a general creditor in the 100 shares of Amalgamated Copper Company stock.

Fifth. The Court erred in holding that Arthur B. Duel did not sufficiently identify in law his 100 shares or part thereof, of Amalgamated Copper Company stock.

Sixth.—The Court erred in holding that Arthur B. Duel did not sufficiently identify in

law the 100/280ths or 5/14ths interest in the Amalgamated Copper Company stock.

Seventh.—The Court erred in holding that Arthur B. Duel was not entitled to recover 100/280ths or 5/14ths interest in the 100 shares of Amalgamated Copper Company stock without specific proof of other character, or further identification than that accepted in the Court below.

Eighth.—The Court erred in holding that Arthur B. Duel was not entitled to recover of the Receiver 5/14ths of any dividends which had been received by said Receiver on the said 100 shares of the Amalgamated Copper Company stock as allowed by the Court below.

Ninth.—The Court erred in holding that the decree of the Court below, awarding to Arthur B. Duel a 100/280ths or 5/14ths interest in the 100 shares of Amalgamated Copper Company stock operated to deplete the fund belonging to the general creditors of the alleged bankrupts.

Tenth.—The Court erred in holding that where there is more than one claimant for whom the bankrupts were carrying Amalgamated Copper stock, and at the time of bankruptcy an amount of such stock is found on the bankrupts' premises not allocated to any particular account but insufficient to supply in full the demands of all such claimants entitled to said stock, such claimants cannot take of the Receiver a pro rata allotment and distribution of such stock so found but must be converted into general creditors for the value of their stock.

Eleventh.—The Court erred in holding that the said 100 shares of Amalgamated Copper

Company stock which the alleged bankrupts held on November 13, 1913, were not held for account pro rata of all of the customers of said bankrupts "long" of said stock who were entitled thereto.

Twelfth.—The Court erred in reversing the said order of the District Court for the Southern District of New York.

Thirteenth.—The Court erred in not affirming the said order of the District Court for the Southern District of New York.

Statement of Facts.

H. B. Hollins & Co. (hereinafter referred to as Hollins & Co.), were stock brokers doing business in the City of New York for several years prior to November 13, 1913, the date of the filing of a petition in bankruptcy against said firm. On October 30, 1912, the appellant, Arthur B. Duel, directed Hollins & Co. to purchase for his account 100 shares of the capital stock of the Amalgamated Copper Company (hereinafter referred to as Copper), and on the same day Hollins purchased for Duel's account 100 shares of Copper stock "and actually received in consummation of such purchase certificates representing 100 shares of said stock." The particular certificates received by Hollins & Co. on account of this purchase were subsequently, and some time prior to November 13, 1913, disposed of by Hollins & Co. by deliveries on account of sales of said stock made by them for customers. Duel never directed or authorized Hollins & Co. to sell his 100 shares of Copper. (Record, p. 16)

Hollins & Co. likewise purchased for the account of Weiner, Levy & Co. 50 shares of Copper stock on or about February 25, 1913, and received in consummation of said purchase a certificate representing 50 shares of such stock, and subsequently, on or about June 13, 1913, disposed of said certificate against a sale of Copper stock in behalf of another customer; Weiner, Levy & Co. never having directed or authorized the sale of said shares. (Record, p. 11)

On or about October 25, 1912, Hollins & Co. purchased for the account of L. M. Bamberger 30 shares of Copper stock, and on October 28th re-

ceived a certificate for 30 shares of said stock, which certificate was shortly after its receipt pledged with the National Bank of Commerce and was held by said bank at the time of the failure of Hollins & Co. (Record, p. 17)

It also appears from the books of Hollins & Co. that on October 28th, they acknowledged themselves to be carrying for Hugo Landau 100 shares of Copper stock, but it does not appear from the record whether Hollins & Co. ever received a certificate for said shares. (Record, Table 37—Exhibit A to Allaire's affidavit.)

On November 13, 1913, when the involuntary petition in bankruptcy was filed against Hollins & Co., and at all times after October 30, 1913, the only customers of Hollins who were "long" of Copper were

Arthur B. Duel	100 shares
Hugo Landau	100 shares
Weiner, Levy & Co.	50 shares
L. M. Bamberger	30 shares
Total	280 shares

(Record, p. 16.)

On November 13, 1913, Hollins had in their possession, or under their control, stock of the Amalgamated Copper Company, as follows:

Pledged with Kings County Trust Company as security for a loan	50 shares
Pledged with National Bank of Commerce, as security for a loan	30 shares
In the safe deposit box of Hollins & Co., free of pledge	*100 shares*

(Record, p. 17)

And, at the time they had outstanding a short sale for one M. R. Hutchinson of.....	100 shares
Total.....	280 shares

(Record, Table 37—Exhibit A to Allaire's affidavit.)

This proceeding is confined to the 100 shares which, on ~~October~~ November 13, 1913, were free of any pledge, and were represented by Certificate No. 29373, in the name of William L. Jones, and endorsed in blank for transfer; Jones having no interest therein. Upon the appointment of the Receiver, he caused this certificate to be surrendered and received a new certificate No. H-40586 for 100 shares in his own name as Receiver. (Record, p. 17)

The 50 shares and 30 shares of Copper, held by the Kings County Trust Company and by the National Bank of Commerce, respectively, have been sold in the process of liquidation of the loans for which they were partial security, and the proceeds therefrom, after payment of the said loans, were nominal. (Record, pp. 2-3)

Aside from the allegations of the petition of the appellant Duel, which, in so far as they contain allegations of fact, were substantially all admitted by the answer of the Receiver, the evidence in the case consisted solely of the affidavit of Charles M. Allaire, who was in the employ of the Receiver, and for many years had been employed as cashier for Hollins & Co.

The following statement is taken from the affidavit of Allaire, (italics ours):

"The circumstances under which Hollins & Co. acquired possession of said certificate No. 29373 were as follows:

"On Saturday, November 8th, 1913, pursuant to the order of one S. M. Schatzkin to sell short 200 shares of Amalgamated Copper stock, Hollins & Co. sold 200 shares of Amalgamated Copper on the New York Stock Exchange, and on the 10th day of November, 1913, in consummation of such short sale, delivered to Sharp & McV. (the name given by the Stock Exchange Clearing House) 100 shares of Amalgamated Copper stock, being the amount of such stock shown to be due on balance by Hollins & Co. to the Clearing House, which 100 shares were represented by two certificates for 50 shares each, numbered 4503 and 4529, *then held for the account of their long customers,* the balance of 100 shares of stock so sold being, through the Clearing House operation delivered to the purchaser by means of 100 shares of said stock borrowed by Hollins & Co. from Slayback & Co. On the 10th day of November, 1913, pursuant to the direction of S. M. Schatzkin, Hollins & Co. covered Schatzkin's short sale of 200 shares of Amalgamated Copper Company stock by purchasing on the Stock Exchange 200* shares of Amalgamated Copper stock, and on the 11th day of November, 1913 (the Clearing House sheets showing that they were entitled on balance to 100 shares of Amalgamated Copper stock from E. Lawrence & Co., the 100 shares borrowed from Slayback & Co. having been returned to Slayback & Co. through the Clearing House operation), they received from E. Lawrence & Co., certificate No. 29373 for 100 shares of Amalgamated Copper stock standing in the name of William L. Jones and endorsed in blank for transfer and, placed said certificate in their safe deposit box, where it remained until the filing of the petition in bankruptcy."

*Appears in printed record as 20, through printer's error—was 200 in record below.

"The said certificate No. 29373 was never marked or otherwise identified by Hollins & Co. as the property of any particular person or customer, or placed in any envelope bearing any indication that the said stock was held for the special account of any particular customer or person, and no memorandum appears upon the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person." (Record, pp. 17-18.)

"It was the practice of Hollins & Co. to use certificates of stock on hand in making deliveries thereof, indiscriminately and without regard to particular certificates or certificate numbers, excepting only cases where customers deposited certificates of stock standing in their own names as margin for their own accounts, where such certificates were usually retained in kind, but at no time from the 1st day of November, 1913, until and including the 13th day of November, 1913, were there any certificates for Amalgamated Copper stock standing in the name of any customers."

"Certificate No. 29373 representing 100 shares of Amalgamated Copper stock was not purchased or received for the account of any member of the firm of Hollins & Co., or for the personal account of said firm as a whole, *but was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date.*"

"It does not appear from the books of Hollins & Co. that there are any persons entitled to claim from Hollins & Co. delivery of any Amalgamated Copper stock, other than the following:

Arthur B. Duel	100 shares
Hugo Landau	100 shares
Weiner, Levy & Co	50 shares
L. M. Bamberger	30 shares

> and no claim of ownership in or to the delivery of Amalgamated Copper stock has been made or asserted by any other person since the appointment of the Receiver herein" (Record, p. 19.)

The appellant Duel was indebted to Hollins & Co. in the sum of $3,333.21, on November 13, 1913, and this indebtedness was set off against the value of the remaining 64.286 shares of Copper, to which Duel was entitled, but which the Receiver was unable to deliver (which exceeded in value Duel's indebtedness) and, as no objection can well be made to the propriety of this set off, either on the facts or on the law, it is unnecessary to comment further thereon.

None of the four customers for whom Hollins & Co. was obligated to carry Copper stock, to wit, Duel, Weiner, Bamberger and Landau, has asserted any special or peculiar interest or property right to the exclusion of the others, in the shares represented by Certificate No. 29,373 found in Hollins & Co.'s box on the appointment of the Receiver; but all who appeared conceded that they were entitled to said stock pro rata in the proportion that the amounts of which they were respectively "long" of such stock, bore to the aggregate of which they were collectively "long".

Landau, in fact, did not appear in the proceeding, and made no claim to any part of the 100 shares of Copper in controversy, either to the exclusion of, or in common with, the other claimants. His indebtedness to the brokers exceeded the total liquidation value of the stock of which he was "long". (Record, Table 38—Exhibit B to Allaire's affidavit.)

I.

The petitioner, Duel, is entitled to at least 5/14ths of the 100 shares of Copper stock which was represented by Certificate No. 29,373 in the box of Hollins & Co. at the time of the filing of the petition in bankruptcy.

The petitioner's claim to share in the 100 shares of copper stock which was in the safe deposit box of Hollins & Co. free of pledge, on the appointment of the Receiver, pro rata with all other customers entitled to Copper stock, rests on the following authorities:

Richardson v. *Shaw*, 209 U. S. 365;
Sexton v. *Kessler*, 225 U. S. 90;
Gorman v. *Littlefield*, 229 U. S. 19.

In *Richardson* v. *Shaw* (*supra*) Shaw & Co. had an account with A. O. Brown & Co., and paid moneys and transferred securities to Brown as margin for the purchase of other securities. Learning that Brown & Co. were in a precarious condition Shaw & Co. demanded a settlement and return of these securities, which Brown & Co. were carrying for their account. At that time Brown & Co. were insolvent within the meaning of the bankruptcy law, and in order to liquidate the account, made payments to enable Shaw & Co., to withdraw their securities from the general loans of Brown & Co.; none of such securities being the identical certificates which Shaw had transferred to Brown & Co. Within four months Brown & Co. were adjudicated bankrupts. Suit was brought by the trustee in bankruptcy for the recovery of

moneys paid to Shaw or transferred by Brown & Co.'s pledgee to Shaw, on the ground that Brown & Co., being insolvent, were under obligation to several customers to redeem their shares of stock from the loan for which they were pledged, this obligation creating a right to demand the pledged stock on the part of each customer, which created the relation of debtor and creditor, and so, if the broker used his funds to redeem for a particular customer, it was an unlawful preference under the bankruptcy act. In holding that the act of Brown & Co. was not an unlawful preference, this Court held that the relation of broker and customer was that of pledgee and pledgor and not that of debtor and creditor.

Mr. Justice Day said at p. 377:

> "The rule thus established by the courts of the State where such transactions are the most numerous, and which has long been adopted and generally followed as a settled rule of law, should not be lightly disturbed, and an examination of the cases and the principles upon which they rest lead us to the conclusion that *in no just sense can the broker be held to be the owner of the shares of stock which he purchases and carries for his customer.* While we recognize that the courts of Massachusetts have reached a different conclusion and hold that the broker is the owner, carrying the shares upon a conditional contract of sale, and, while entertaining the greatest respect for the Supreme Judicial Court of that State, we cannot accept its conclusion as to the relation of broker and customer under the circumstances developed in this case. We say this, recognizing the difficulties which can be pointed out in the application of either rule."

and on pp. 378-9:

> "It is objected to this view of the relation of customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker in the shares; but this contention loses sight of the fact that *the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares.* The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.
>
> "A certificate of the same number of shares, although printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. *It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer. Horton* v. *Morgan,* 19 N. Y. 170; *Taussig* v. *Hart,* 58 N. Y. 425; *Skiff* v. *Stoddard,* 63 Connecticut, 198, 218. As was said by the Court of Appeals of New York in *Caswell* v. *Putnam,* 120 N. Y. 153, 157, 'one share of stock is not different in kind or value from every other share of the same issue and company. They are unlike distinct articles of personal property which differ in kind and value, such as a horse, wagon or harness. The stock has no earmark which distinguishes one share from another, so as to give it any additional value or importance; like grain of a uniform quality, one bushel is of the same kind and value as another."

And at p. 380:

> "We reach the conclusion, therefore, that although the broker may not be strictly a pledgee, as understood at common law, he is, essentially, a pledgee and not the owner of the stock and turning it over upon demand to the customer does not create the relation of a preferred creditor within the meaning of the bankrupt law."

Mr. Justice Holmes, concurring, said at pp. 384-5:

> "If I had been left to decide this case alone I should have adhered to the opinion which, upon authority and conviction, I helped to enforce in another place. I have submitted a memorandum of the reasons that prevailed in my mind to my brethren, and as it has not convinced them I presume that I am wrong. I suppose that it is possible to say that after a purchase of stock is announced to a customer *he becomes an equitable tenant in common of all the stock of that kind in the broker's hands,* that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customers' claims, and *that the the nature of the stock identifies the fund as fully as a grain elevator identifies the grain for which receipts are out.* It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to receive it from the bankrupt, on paying whatever remained to be paid. A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt."

In *Sexton* v. *Kessler* (*supra*), Mr. Justice Holmes, said at pp. 97 and 98:

> "But the decisions of this court and of New York agree that there may be title in a stronger case than this. 'When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, *or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes.* Yet as he is bound to keep stock enough to satisfy his contracts, as the New York firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. *Richardson* v. *Shaw*, 209 U. S. 365. *Markham* v. *Jaudon*, 41 N. Y. 235. So a depositor in a grain elevator may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned."

These two cases finally established two principles upon which the decision of *Gorman* v. *Littlefield*, (the principal authority upon which the appellant relies) rests; first, that a customer for whom a broker is carrying stock on margin, is the owner of the stock and the broker merely the pledgee; and, second, that the broker is not required to retain particular certificates representing stock purchased for a customer (if, in fact, he received any cer-

tificate on the purchase for that customer), or to allocate to such customer a particular certificate representing the shares purchased by him; but is only obligated to carry stock of the same kind in order that he may respond to the demand of the customer for his property. The wisdom of the latter rule is apparent—modern business methods demanded it. Upon the establishment of the clearing house system by the New York and other stock exchanges, it became impossible for a broker, in the majority of cases, to identify and set aside for each "long" customer a particular certificate as received for such customer's account. If a broker conducts several transactions on the Stock Exchange for the purchase and sale of a particular stock on a single day, he cannot place his finger on the particular certificate purchased for each customer as, in such case, by the clearing house operation, he will only receive certificates for shares representing the balance of his purchases over his sales; and if his sales exceed his purchases of said stock he will receive no certificates, and must, on the other hand, deliver to the broker named by the clearing house, certificates representing his debit balance in the stock in question, which he must secure either by borrowing in the loan market or by appropriating, legally or illegally, certificates in his possession held for the account of his "long" customers, unless he has stock of his own, which is unusual.

As shown by the record in this case (p. 19), and also in the case of Gorman *vs.* Littlefield, it is not the custom or practice of brokers to allocate to customers certificates purchased for them on margin, but on the contrary to place certificates indiscriminately in their boxes, and to use the same to consummate sales without regard to particular certificates or certificate numbers.

In *Gorman* v. *Littlefield*, (*supra*), A. O. Brown & Co., stock brokers, were obligated, at the time of their failure, to carry for Gorman 250 shares of Green Cananea Copper Company stock. Brown & Co. had disposed of the particular certificates which they had received on the purchases made for Gorman. The Receiver of Brown & Co. came into the possession of certificates endorsed in blank for an aggregate of 350 shares of this stock. No claim for such stock was filed with the Receiver or Trustee, except Gorman's claim. *Brown & Co. placed the certificates for stock, which they purchased for their clients, whether paid for in full or purchased on margin, without discrimination in the same tin box.* It was the custom of Brown & Co. to take certificates to make delivery from this box indiscriminately, unless the certificates had been transferred to the name of the customer. At no time before the failure did the claimant receive his shares of Copper stock, nor did he order their sale.

Justice Day, referring to *Richardson against Shaw* (*supra*), said that it was there held "that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but

is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another." Justice Day also quoted extensively from *Sexton* v. *Kessler* (*supra*), and said at pages 24 and 25:

> "It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. *It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer.* And in this respect the trustee in bankruptcy is in the same position as the broker. *Richardson* v. *Shaw, supra.*
>
> "It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. *It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind and keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him.* If he did this, the identification of particular certificates is unimportant. *Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estates to the detriment of other creditors who had no property rights in the certificates held for particular customers.* No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of

> another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt. * * *
>
> "We think there should be no presumption that the stock was stolen or embezzled with intent to deprive the rightful owner of it, and when the unclaimed shares are found in the possession of the bankrupt it is only fair to accept the general presumption in favor of fair dealing and to decide in the absence of counter-vailing proof, that the broker out of his funds has supplied the deficiency for the benefit of his customer, which he had a perfect right to do."

The principle clearly announced in the Gorman case is, that when a stock broker is obligated to carry for customers stock of a particular kind and at the time of the filing of the petition in bankruptcy certificates for that kind of stock are found in the possession or under the control of the stock broker, such facts, in the absence of countervailing proof, sufficiently identify the shares represented by such certificates as the shares of those customers of that kind of stock whose shares are not represented by other certificates specifically identified as theirs, if and when such identification is possible.

The facts in this case require the application of this principle to the 100 shares represented by Certificate No. 29373 so far as Duel and Weiner, Levy & Co. are concerned, and that is all that it is necessary to decide to sustain the order of the District Judge.

There is no proof, and there is no suggestion, that Hollins & Co. were entitled to any interest in the shares represented by Certificate No. 29373, except their interest as pledgees, and any suggestion that any persons other than the customers of

Hollins & Co. were the owners of the shares of this certificate would be contrary to the evidence.

There is no "countervailing proof" whatever to rebut the presumption that the broker in acquiring copper stock intended to fulfill his duty to his "long" customers. As the District Judge said, (Record, p. 24):

> "Nor is there here any countervailing proof,—indeed this record is more favorable to Hollins' customers in copper than was the evidence in Gorman's case. It is uncontradicted that on November 7th, Hollins had on hand 100 shares,—'*for account of their long customers.*' They were used to 'carry' Schatzkin,—that they emerged from that transaction in different certificates but unchanged in their relation to Hollins, needs no exposition in a community much too familiar with transactions such as have here been outlined."

The situation here is practically identical with that in the Gorman case, except that here there are four persons who might have claimed to be the owners of Copper stock and an insufficient amount of such stock to satisfy all in full, while in the Gorman case there was but one claimant and more than enough stock to satisfy his claim. The respondents claim that this difference distinguishes the Gorman case from this case and destroys its value as a controlling authority, and the Circuit Court of Appeals so held, and in so holding we submit that it was manifestly in error.

Let us assume there were two customers "long" of 50 shares of Copper each and the broker on bankruptcy had a 100 share certificate in his box, could it then be seriously claimed that the principle of the Gorman case would not justify the

award to each of said customers of 50 of the 100 shares represented by said certificate?

Again, assuming there was but one customer "long" of 100 shares and a certificate for 99 shares was in the box, would the deficiency of one share defeat the claim of the customer to his property?

The convincing logic and sound reasoning of the District Judge justifies an extensive quotation from his opinion (italics ours):

> "This claim is the legitimate aftermath of Gorman *vs.* Littlefield, 229 U. S., 19, if that decision logically follows Richardson *vs.* Shaw, 209 U. S., 365, and Sexton *vs.* Kessler, 225 U. S., 90. That there is such logical sequence Justice Day's opinion asserts, and it seems to me plain enough.
>
> "All these controlling cases fully accept the 'grain-elevator' doctrine respecting stocks, so that a customer who finds any stock of the kind he bought on his broker's premises, can claim what he finds, for it is 'unnecessary * * * to put his finger on the identical certificates purchased for him.'
>
> "This right is helped out by that 'presumption in favor of fair dealing' so much dwelt on in the higher courts, though said presumption is productive of cynic smiles even in counsel advancing the same, in Courts nearer real life,—as it is seen in stockbrokers' shops.
>
> "Putting together these controlling fictions, it is difficult to see what exclusive right any customer can have in any given certificate until he gets it in possession; but that claim still awaits decision.
>
> "If there were 280 (or more) shares of Copper in the Receiver's hands the Gorman case would be plainly applicable,—but there are only an hundred, and that fact is said to entail both a difference and distinction.

"It is true that Day, J., twice referred to the presence of shares sufficient to satisfy the demand of the petitioner Gorman,—as if that fact were significant. It was significant, after the fictional presumption had been made; that what the brokers had on hand, was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares, acquiring the exact amount taken, is quite significant of intent to make good the wrong done.

"But if by dwelling upon number of shares on hand, anything more than this was meant, the logical symmetry of the fictions on which the decision rests is seriously impaired,—to say the least.

"If stock purchasers dealing in a given stock at a given broker's, are entitled to regard his aggregate purchases as so much grain in a bin, (at least until he allots the stock in *specie*, if there is such a thing); and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of 'stock-grain' is intended to fill up the bin again,—what difference can it make that when the broker is surprised by bankruptcy the bin is full or half full, or as here 10/28 full?

"Again it is urged that Gorman's case did no more than relax the rules of identification. Gorman was refused any stock in this Court, because he could not identify as his the stock on hand, but the very ground of decision in the Supreme Court is that no identification is necessary,—the presumption of restitution plus the physical presence of some stock, supplies the lack,—'in the absence of counter-availing proof.' To call what occurred in Gorman's case identification, is playing with words.

"Nor is there here any counter-vailing proof,—indeed this record is more favorable to Hollins' customers in Copper, than was the

evidence in Gorman's case. It is uncontradicted that on November 7th, Hollins' had on hand 100 shares 'for account of their long customers.' They were used to 'carry' Shatzkin,—that they emerged from that transaction in different certificates, but unchanged in their relation to Hollins', needs no exposition in a community much too familiar with transactions such as have here been outlined.

"In short, if one deals with facts instead of fictions, it is true that any customer who had applied for his Copper before bankruptcy would have gotten these 100 shares, or the proper part thereof.

"The effect of bankruptcy is, that all apply together,—and so all must share *pro rata.*"

(Record, pp. 23-24).

It so happens that the District Judge who decided this case also decided the Gorman case adversely to the claimant Gorman, his decision being sustained by the Court of Appeals for the Second Circuit; both Courts being of the opinion that as Gorman could not identify the *particular certificate* purchased for him, his claim must fall. The District Judge has bowed in this case to the obvious mandate of this Court, as announced in the Gorman case, but the Circuit Court of Appeals still clings tenaciously to the theory of certificate identification, and is unwilling to apply the principle of the Gorman case except under identical facts. In fact, that Court seems to have isolated the Gorman case until it has become almost an academic proposition of law in the Second Circuit, although, we submit, the principle therein announced is of very general application. It would seem that the rule of certificate identification as formerly applied by the Courts has become very much limited, and that it only applies where stock

is transferred into the customer's name, or where a certificate has been deposited for safe keeping, or as collateral as in *Thomas* vs. *Taggart, 209 U. S. 385,* and the identical certificates deposited are found in the bankrupt's possession; or, perhaps, where a broker for special reasons has set apart for a customer certificates representing his stock, by placing them in a separate enclosure, properly endorsed, to indicate a special ownership therein.

But Allaire says (Record, p. 18), that certificate No. 29,373 was not marked or identified as the property of any particular customer, and that the books of Hollins & Co. contained no memorandum to the effect that said certificate was purchased or held for any particular customer or person.

In this connection, we call attention to the statement of the Justice writing for the Circuit Court of Appeals in this case, with reference to the rights of Bamberger (Record, p. 37), that "every one concedes that his 30 shares are represented by the certificate for that amount held by the bank" (Bank of Commerce). The Justice misapprehended the situation, as no such concession appears in the record, nor, in fact, was it made by counsel for either appellant. It seems at least questionable whether the mere fact that a certificate was received on the delivery day following Bamberger's purchase of 30 shares, for the same number of shares, alone constitutes a basis for the identification of this certificate as Bamberger's special property, but the question is not entitled to extended consideration as the determination thereof one way or the other cannot adversely affect the rights of the claimants herein. The conclusion of the Circuit Court of Appeals, however, (Record, p. 37), that the application of the Gorman case would lead, in

this instance to a double identification by Bamberger is not well founded. If Bamberger could have identified the 30 share certificate as his special property under the facts, which we believe is open to question, then he certainly could not claim a part of the 100 share certificate in controversy, and if he is not entitled to any part of the 100 share certificate, his elimination as a claimant would extend and not limit the rights of the other claimants. Duel for instance could then claim 100/250 of the 100 shares of Copper instead of 100/280 as claimed. Bamberger, failed to elect whether to claim the particular certificate pledged with the Bank of Commerce, or to waive that right and claim participation in the 100 shares free of pledge, and was properly eliminated by the District Judge from participation in the 100 shares in controversy. He filed no answer and made no formal claim. The District Judge said:

> "As Bamberger will not come upon this fund on the only basis admissible, he is relegated to his rights elsewhere" (Record, p. 24).

The anomalous situation in respect to Bamberger's claim resulting from the application of the Gorman case, pointed out by the Circuit Court of Appeals, does not, therefore, exist, and cannot exist.

We proceed to the actual ground taken by the Circuit Court of Appeals for reversing the order of the District Court, namely, the differentiation of this case from the Gorman case, by reason of the fact that the shares on hand were not sufficient to satisfy the demands of "long" customers in full. The Circuit Court of Appeals refers in its

opinion (Record, p. 37) to the statement in the opinion of Justice Day in the Gorman case that "certificates were found in the bankrupt's possession in an amount greater than should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock." No more effective answer can be made to this argument than that of the District Judge, viz.:

> "It is true that Day, J., twice referred to to the presence of shares sufficient to satisfy the demand of the petitioner Gorman,—as if that fact were significant. It was significant, after the fictional presumption had been made; that what the brokers had on hand, was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares, acquiring the exact amount taken, is quite significant of intent to make good the wrong done.
>
> "But if by dwelling upon number of shares on hand, anything more than this was meant, the logical symmetry of the fictions on which the decision rests is seriously impaired,—to say the least.
>
> "If stock purchasers dealing in a given stock at a given broker's, are entitled to regard his aggregate purchases as so much grain in a bin, (at least until he allots the stock in specie, if there is such a thing); and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of 'stock-grain' is intended to fill up the bin again;—what difference can it make that when the broker is surprised by bankruptcy the bin is full or half full, or as here 10/28 full?" (Record, pp. 23-24.)

On the appeal to the Circuit Court of Appeals it was claimed that the record, particularly Exhibit A attached to the affidavit of Allaire (Rec-

ord, Table 37), supported a series of inferences or conclusions of fact and of law, from which it appeared that the customer Landau had a special and peculiar claim to 50 shares of the 100 shares found in the possession of the bankrupt, and also that, as above noted, the customer Bamberger could identify, as the certificate purchased for him, the certificate for 30 shares pledged with the National Bank of Commerce.

As to this claim as to Landau, we will not at this time enter into a detailed analysis of the facts, as we cannot anticipate that counsel for the alleged bankrupts will press this point upon this appeal. If the occasion arises we can show conclusively that the record furnishes no foundation for such a claim.

While the Circuit Court of Appeals observed that there was some force in the contention that Landau might have traced his purchase to the extent of 50 shares of the 100 shares in controversy, *it dismissed the question with the remark that it was not necessary to decide the question as Landau was making no claim.* We may observe, however, that even if there were any foundation in fact or law for the contentions, (a) that Landau had a special claim to, or interest in, 50 shares of the 100 shares free of pledge, and (b) that the interest of the customer Bamberger was represented by the 30 share certificate pledged with the Bank of Commerce, the result would be that the appellants, Duel and Weiner, Levy & Co. would be together entitled to 50 of the 100 shares in controversy. As they concede, as between themselves, that Duel is entitled to ⅔ and Weiner & Co. to ⅓ of the shares to which they are together entitled, Duel's claim would be 33⅓ shares instead of 35.714

shares, and Weiner, Levy & Co.'s claim would be 16⅔ shares instead of 17.857 shares, which adjustment could be effected by a modification of the order of the District Judge.

The inaccuracy of the analysis of the evidence by the Circuit Court of Appeals appears from the statement in their opinion (Record, p. 37) to the effect that, from an examination of the record, they found much force in the contention that "Weiner's 50 shares were in the box." As a matter of fact, there is not a trace of evidence in the record to this effect, but, on the contrary, it appears from Weiner's answer that the certificate received pursuant to their purchase by Hollins & Co. passed from the possession and control of Hollins & Co. "on or about June 13, 1913, against a sale of capital stock of Amalgamated Copper Company for and in behalf of another customer of said H. B. Hollins & Co." (Record, p. 11). Neither Weiner, Levy & Co., nor any other party to the controversy, made any claim to the contrary; Weiner, Levy & Co. conceding that their right was merely to an undivided 5/28ths of the shares represented by the 100 share certificate, *pro rata* with the other claimants. If the Circuit Court of Appeals was of the opinion that Weiner, Levy & Co. could identify 50 of the shares covered by the 100 share certificate as their exclusive property, *why were Weiner, Levy & Co. denied any participation in the 100 share certificate?*

The final paragraph in the opinion of the Circuit Court of Appeals reads (Record, p. 38):

> "The rights of general creditors are likely to be seriously impaired, if the theory of constructive identification, based on presump-

tions of intent, be carried to the extent here asked for."

This regard for the rights of general creditors ignores the fact that customers "long" of stock are *the owners of the stock carried for them by the brokers,* and as this Court said in the Gorman case, "no creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the bankrupt."

The Circuit Court of Appeals also laid some stress upon the case of *In Re T. A. McIntyre & Co.,* petition of Mary D. Grace, 181 Fed. Rep. 960, from which decision a petition for certiorari was made to this Court and refused, (*Grace* v. *Burlingham,* 218 U. S. 672); the point being made that the theory here relied upon was submitted with the petition for certiorari. It is sufficient to remark, first, that the action of this Court in the Grace case preceded the decision in *Gorman* v. *Littlefield* in point of time; second, that the refusal of a writ of certiorari determines no substantive question of law, but is simply the exercise by the Court of its discretion to deny in the particular case the application for a writ of certiorari; and third, in the Grace case the brokers owed their customers 1651 shares of Southern Pacific stock, and had but 107 shares on hand or in pledge, and the petitioner Grace who was "long" of 200 shares *claimed the entire shares on hand.* The Grace case, therefore, differed essentially from this case, as here the claimants merely claim *pro rata* and there is no conflict between the claimants, who concede that they should share *pro rata* as "equitable tenants in common."

In the hearings below in this proceeding, some reliance was placed by the respondent on certain decisions dealing with the question of tracing trust funds. The principles involved in those cases have no application to this controversy. The claims of Duel and Weiner, Levy & Co. are based, not upon the right to trace trust funds, but upon the property right to the shares on hand, a right which has been definitely recognized by this court.

In *National City Bank* vs. *Hotchkiss*, 231 U. S., 50, Justice Holmes said, at page 58:

> "In both *Gorman* vs. *Littlefield*, 229 U. S. 19 and *Richardson* vs. *Shaw*, 209 U. S., 365, in addition to the personalty of the holder *there was also a specific stock, which identified the fund relied upon and separated it from the general mass of the estate.*"

As previously shown, except in isolated cases (as, for instance, when a broker had but one transaction in a given stock during a day—a purchase) it is impossible to identify the particular certificates received on individual purchases through the Stock Exchange, owing to the clearing house operation. To require customers to identify particular certificates purchased for them, under the modern practice, would result in denying them their property rights in the majority of cases. In view of this practical situation, coupled with the legally recognized right of a broker to discharge his obligation to his customers by delivering any certificates for the requisite number of shares, it would be juggling with words to say that the customers are the *owners* of the shares purchased for them unless they were held to be "equitable

tenants in common of all the stock of that kind in the broker's hands".

Customers are the owners of shares, but not of certificates, except perhaps in isolated cases or under peculiar circumstances. The shares are the same as the wheat in the bin. The number of shares may increase and decrease; the customers may change; old certificates may disappear and new ones may take their place; there may be a surplus, a deficit or an equilibrium between the shares on hand and the aggregate potential demand of all customers; but, whatever may be the changes and whatever may be the relation between demand and supply, the customers are the owners of the shares on hand, and under the decisions of this court their rights as owners will be enforced against the broker and his receiver or trustee in bankruptcy.

We submit that the Circuit Court of Appeals was clearly in error in holding that the decision of this Court in *Gorman* vs. *Littlefield* was not controlling in favor of the claim of the appellant Duel.

II.

The order of the Circuit Court of Appeals for the Second Circuit should be reversed, and the order of the District Judge affirmed.

Respectfully submitted,

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LEWIS L. DELAFIELD,
FREDERICK W. LONGFELLOW,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 352.

ARTHUR B. DUEL,
Appellant,

vs.

HARRY B. HOLLINS ET AL., individually and as members of the firm of H. B. HOLLINS & Co., Alleged Bankrupts, and A. LEO EVERETT, Receiver.

No. 353.

WIENER, LEVY & CO.,
Appellants,

vs.

HARRY B. HOLLINS ET AL., individually and as members of the firm of H. B. HOLLINS & Co., Alleged Bankrupts, and A. LEO EVERETT, Receiver.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANTS WIENER, LEVY & CO.

CARL A. DE GERSDORFF,
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Of Counsel for Appellants Wiener, Levy & Co.

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SUBJECT INDEX.

LIST OF CASES.

Supreme Court of the United States,

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF WIENER, LEVY & CO., APPELLANTS.

These are appeals from a decree of the United States Circuit Court of Appeals for the Second Circuit, entered December 29, 1914 (Record, p. 38), reversing

an order of the District Court of the United States for the Southern District of New York of April 3, 1913 (Record, pp. 25, 26, 27), which allowed the claim of appellant Duel to 35.714 shares and the claim of appellees Wiener, Levy & Co. to 17.857 shares, of Amalgamated Copper Company stock out of 100 shares of said stock found in the box of H. B. Hollins & Co., stock brokers in New York City, at the time of their alleged bankruptcy.

The Receiver found in the brokers' box a certificate of 100 shares of Amalgamated Copper Company stock, free of pledge, not marked with the name of any customer, and not allocated to any customer's account or to the account of the firm or any member thereof. Appellant, Duel, a customer, for whom the firm was obligated to carry 100 shares of such stock, filed a petition claiming to be the owner of an undivided $\frac{5}{14}$th interest (35.74 shares) in said 100 shares and appellants, Wiener, Levy & Co., also customers for whom said firm was obligated to carry 50 shares of said stock, filed an answer claiming to be the owners of an undivided $\frac{5}{28}$th interest (17.857 shares) in said shares. Two other customers, Landau and Bamberger (who with appellants were all the customers for whom said firm was obligated to carry any Amalgamated Copper Company stock), were made parties and the interests claimed by the appellant were the *pro rata* amounts of said 100 shares to which they were at least entitled. The following papers were before the District Court :

(1) Petition of Duel, verified January 28, 1914 (Rec., pp. 1–6) ;

(2) Order to show cause of MAYER, J., granted upon said petition (Rec., pp. 6, 7) ;

(3) Affidavit of service of petition and of order to show cause verified January 30, 1914 (Rec., p. 8) ;

(4) Answer of A. Leo Everett, Receiver, verified February 28, 1914 (Rec., pp. 8, 9) ;

(5) Answer of Wiener, Levy & Co., verified March 12, 1914 (Rec., pp. 10–15) ;

(6) Affidavit of Charles M. Allaire, verified March 9, 1914 (Rec., pp. 16-20 and Exhibits marked 37-41).

The petition and order to show cause were duly served on all parties as therein directed, all of whom appeared except Landau (Record, p. 23). The question presented on these appeals is whether several customers of a stock broker, who are the only ones for whom the broker is obligated to carry a particular stock, may, upon the broker's bankruptcy, reclaim according to their *pro rata* interest, stock of that character which is found in the broker's possession at bankruptcy, free of pledge, unmarked and not carried in the name of any customer or of the bankrupts, and which is insufficient to satisfy their claims in full. The District Court sustained this contention, relying upon the principles announced by this Court in *Gorman vs. Littlefield*, 229 U. S., 19 (May 26, 1913). The Circuit Court of Appeals took the opposite view and these appeals are from its decree reversing the order of the Court below. No objection to the order of the District Court was made by any customer of the brokers whether entitled to Amalgamated Copper or any other kind of stock.

Statement of Facts.

For several years prior to November 13, 1913, when the petition in bankruptcy was filed against them, H. B. Hollins & Co. (hereinafter referred to as Hollins & Co.) had been stock brokers doing business in the City of New York. On February 25, 1913, Hollins & Co. purchased by direction of appellants Wiener,

Levy & Co., and for their account, 50 shares of the stock of the Amalgamated Copper Company (hereinafter referred to as Copper) of the par value of $100 per share, at 68⅜, and received in consummation of the purchase certificate No. 3,556 for 50 shares. Hollins & Co. then notified Wiener, Levy & Co. of the purchase and that they were carrying for the latter's account 50 shares of said stock. Wiener, Levy & Co. never received this or any other certificate for said shares. On or about June 13, 1913, this certificate passed out of the possession and control of Hollins & Co., having been used by them to make delivery on a sale of Copper stock for another customer. Wiener, Levy & Co. never directed or authorized Hollins & Co. to sell their 50 shares, or any of them (Rec., p. 11).

It appears from the books of Hollins & Co. that they had purchased for appellant, Duel, 100 shares of Copper stock on October 30, 1912. They received a certificate for 100 shares in consummation of such purchase, which, however, some time prior to November 13, 1913, was disposed of by Hollins & Co. by deliveries on account of sales of said stock made by them for customers. Duel never directed or authorized Hollins & Co, to sell his 100 shares of Copper stock (Rec., p. 16). It also appears that Hollins & Co. purchased on or about October 25, 1912, 30 shares of Copper stock for the account of L. M. Bamberger. They received on October 28, 1912, a certificate for 30 shares of said stock, which shortly thereafter they pledged in a loan with the National Bank of Commerce and which was so held on November 13, 1913, when the petition in bankruptcy was filed (Rec., p. 17). It further appears from their books that on October 28, 1912, Hollins & Co. acknowledged themselves to be carrying for the account of Hugo Landau 100 shares of Copper stock. It does not appear from the record whether Hollins & Co. ever received a certificate for said shares (Rec., p. 20, Exhibit A, 37).

At the date of the bankruptcy proceedings, Novem-

ber 13, 1913, the only customers of Hollins & Co. "long" of Copper were:

Arthur B. Duel	100 shares
Hugo Landau	100 shares
Wiener, Levy & Co.	50 shares
L. M. Bamberger	30 shares
Total	280 shares

(Rec., p. 16). At this time Hollins & Co. had in their possession or under their control Copper stock as follows:

Pledged with Kings County Trust Company as security for a loan	50 shares
Pledged with National Bank of Commerce for a loan	30 shares
In the safe deposit box of Hollins & Co., free of pledge	100 shares
And had outstanding a short sale for M. R. Hutchinson	100 shares
Total	280 shares

(Rec., p. 17, Exhibit A, 37).

The 100 shares found in the box of Hollins & Co. at the date of the bankruptcy proceedings were represented by a certificate No. 29,373 in the name of William L. Jones, endorsed in blank for transfer. Jones was not a customer of the brokers, had no interest in this certificate and his name was used only for the purpose of transfer. Subsequently, the Receiver surrendered the certificate in order to receive against it a new one No. H40586 for 100 shares in his own name as Receiver (Rec., p. 17). This controversy deals with this certificate.

There is no issue of fact concerning this certificate. The evidence concerning it consists solely in the affidavit of Allaire, who was in the employ of the Receiver and prior thereto had been employed for several years by Hollins & Co. as cashier. He had charge

of their books and records and was familiar with their business (Rec., p. 17). The affidavit states :

> " The circumstances under which Hollins & Co. acquired possession of said certificate No. 29373 were as follows: On Saturday November 8th, 1913, pursuant to the order of one S. M. Schatzkin to sell short 200 shares of Amalgamated Copper stock, Hollins & Co. sold 200 shares of Amalgamated Copper on the New York Stock Exchange and on the 10th day of November, 1913, in the consummation of such short sale, delivered to Sharp & McV. (the name given by the Stock Exchange Clearing House) 100 shares of Amalgamated Copper stock, being the amount of such stock shown to be due on balance by Hollins & Co. to the Clearing House, which 100 shares were represented by two certificates for 50 shares each, numbered 4503 and 4529, then held for the account of their long customers, the balance of 100 shares of stock so sold being, through the Clearing House operation delivered to the purchaser by means of 100 shares of said stock borrowed by Hollins & Co. from Slayback & Co. On the 10th day of November, 1913, pursuant to the direction of S. M. Schatzkin, Hollins & Co. covered Schatzkin's short sale of 200 shares of Amalgamated Copper Company stock by purchasing on the Stock Exchange 200* shares of Amalgamated Copper stock, and on the 11th day of November, 1913 (the Clearing House sheets showing that they were entitled on balance to 100 shares of Amalgamated Copper stock from E. Lawrence & Co., the 100 shares borrowed from Slayback & Co. having been returned to Slayback & Co. through the Clearing House operation),

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*This sum appears in Record (p. 18) as 20 instead of 200. This is printer's error. 200 appears in Record below and in original affidavit.

they received from E. Lawrence & Co. certificate 29373 for 100 shares of Amalgamated Copper stock standing in the name of William L. Jones and endorsed in blank for transfer, and placed said certificate in their safe deposit box, where it remained until the filing of the petition in bankruptcy" (Rec., p. 18).

This certificate No. 29373, was received by Hollins & Co. in the general course of their business without regard to any particular customer and merely for the purpose of making delivery to their customers "long" of Copper stock.

It was not allocated to any particular account, but was *held for account at large of all entitled thereto.* Concerning this the affidavit of Allaire states :

"The said certificate No. 29373 was never marked or otherwise identified by Hollins & Co. as the property of any particular person or customer, or placed in any envelope bearing any indication that the said stock was held for the special account of any particular customer or person, and no memorandum appears upon the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person (Rec., p. 18). * * *

"It was the practice of Hollins & Co. to use certificates of stock on hand in making deliveries thereof, indiscriminately and without regard to particular certificates or certificate numbers, excepting only cases where customers deposited certificates of stock standing in their own names as margin for their own accounts, where such certificates were usually retained in kind, but at no time from the 1st day of November, 1913, until and including the 13th day of November, 1913, were there any certificates for Amalgamated Copper stock standing in the name of any customers.

"Certificate No. 29373 representing 100 shares of Amalgamated Copper stock was not purchased or received for the account of any member of the firm of Hollins & Co., or for the personal account of said firm as a whole, but was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date.

"It does not appear from the books of Hollins & Co. that there are any persons entitled to claim from Hollins & Co., delivery of any Amalgamated stock, other than the following:

Arthur B. Duel	100 shares
Hugo Landau	100 shares
Wiener, Levy & Co.	50 shares
L. M. Bamberger	30 shares

and no claim of ownership in or to the delivery of Amalgamated Copper stock has been made or asserted by any other person since the appointment of the Receiver herein" (Rec., p. 19).

Appellant, Duel, claimed $\frac{100}{280}$ or $\frac{5}{14}$, and appellants, Wiener, Levy & Co. claimed $\frac{50}{280}$ or $\frac{5}{28}$, in all 53.571 shares, of the 100 shares found in the brokers' box, this being the total of their proportionate interests ratably with the interests of all other customers "long" of Copper stock on November 13, 1913.

Appellants Wiener, Levy & Co. were indebted to Hollins & Co. on November 13, 1913, in the sum of $290.97. The District Court directed that the Receiver deliver to Wiener, Levy & Co. 17.857 shares out of said 100 shares and that, as against the remaining 32.143 shares, which the Receiver could not deliver, Wiener, Levy & Co. might set off the above indebtedness of $290.97. Figured at 70.1/8 (the amount specified in the order as the current price of copper stock November 13, 1913) the value of 32.143 shares would be $2,254.02, ample for the purposes of

set off. The Receiver was directed to deliver to appellant Duel 35.714 shares, and Duel was allowed to set off his indebtedness of $3,333.21 against the value of the remaining 64.286 shares which the Receiver could not deliver. Landau did not appear in the proceeding, although duly notified (Rec., p. 23) and made no claim to any part of the 100 shares and it appeared that he was in debt to Hollins & Co. largely in excess of the value of the 100 shares of which he was "long" in his account with the brokers (Rec., p. 20, Exhibit B, 38). Bamberger appeared in the proceeding but did not show payment for his stock even by liquidation, and did not make claim to an interest in the said 100 shares, apparently having elected to proceed otherwise for such claim as he may have.

Errors Relied Upon.

Appellants Wiener, Levy & Co. specify in their assignment thirteen separate errors (Record, pp. 47, 48, 49) claimed to be involved in the decree of the Court of Appeals. They consist:

In holding that appellants were not entitled to share *pro rata* with other customers similarly entitled, in the 100 shares of Copper stock (1st assignment, Rec., p. 48);

In holding that appellees were entitled to the whole of said 100 shares (2nd do);

In holding that appellants were not entitled to at least a $\frac{5}{8}$ interest in said 100 shares; (3d do.).

In holding that appellants were not entitled to recover of the Receiver $\frac{5}{8}$ of any dividends which had been received on said 100 shares; (4th do.).

In holding that appellants were not entitled to any interest in said 100 shares, other than as general creditors of the brokers; (5th do.).

In holding that appellants did not sufficiently identify in law their 50 shares or part thereof of said stock; (6th do.).

In holding that appellants did not sufficiently identify in law a $\frac{5}{28}$ interest in said shares; (7th do.).

In holding that appellants were not entitled to recover at least a $\frac{5}{28}$ interest in said shares without other or further identification than that accepted in the District Court; (8th do.).

In holding that the order of the District Court awarding a $\frac{5}{28}$ interest in said shares operated to deplete the fund belonging to the general creditors of the brokers; (9th do.).

In holding that when there is more than one customer at the time of the brokers' bankruptcy for whom the latter are obligated to carry shares of a particular stock and an amount of such stock is found in the brokers' premises not belonging to any particular customer, unmarked and free of pledge, but insufficient to supply in full the claims of all the customers to such stock, such customers cannot reclaim the stock so found by *pro rata* distribution among themselves, but must be converted into general creditors for the value of their claims; (10th do);

In holding that the said 100 shares found in the brokers' box at the time of bankruptcy were not held for account *pro rata* of all the customers of said brokers "long" of said stock entitled thereto; (11th do.).

In reversing and not affirming the order of the District Court (12th, 13th, Rec., pp. 48, 49).

ARGUMENT.

I.

Appellants Wiener, Levy & Co. are entitled to at least an undivided 5/28 interest in the 100 shares of Amalgamated Copper stock represented by Certificate No. 29,373 found in the box of Hollins & Co., at the time of the filing of the bankruptcy petition.

We submit that this follows necessarily from the doctrine now settled by this Court respecting the rights of a customer in shares of stock not in the name of any particular person found on the broker's premises at the time of bankruptcy when the broker was obligated to carry the same kind of stock for the customer's account.

In Gorman vs. Littlefield, 229 U. S., 19 (May 26, 1913), A. O. Brown & Co., stock brokers, had purchased for Gorman, on four different orders, an aggregate of 250 shares of Green Cananea Copper stock. The certificates so received had been used by the brokers for deliveries on sales for other customers. On the bankruptcy of the brokers the Trustee found certificates for an aggregate of 350 shares of this stock, endorsed in blank, to which no claim had been filed. These certificates with those received or purchased for other customers, whether paid in full or purchased on margin, were placed without discrimination in the same tin box. It was customary to take certificates therefrom to make delivery indiscriminately, unless the certificate had been transferred to the name of the customer. Gorman never received his shares of the stock, nor did he order their sale. In the language of the Court, the

question raised was, "Are these shares of stock a part of the general estate for the benefit of creditors, or should they be turned over to the claimant?" The question was answered in favor of the claimant. Gorman was held entitled to take his 250 shares out of the 350 shares so found. The Court, through Mr. Justice DAY, held that the certificate was not the property itself, but merely the evidence of it, and that a certificate for a certain number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation. These shares were not like individualized articles of personal property, such as a horse or a watch differing in value and feature, but were like grain in a bin, one bushel being of the same kind and value as another. It was contended that Gorman could not trace or identify his certificate, just as in the present case the Court of Appeals thought that appellants could not trace their certificate into the 100 share certificate found in Hollins' box. But this identification was held to be unimportant, the Court saying (pp. 24, 25):

> "It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker Richardson v. Shaw, *supra*.
>
> "It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown

that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind and to keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. *If he did this, the identification of particular certificates is unimportant. Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt.** * * * We think there should be no presumption that the stock was stolen or embezzled with intent to deprive the rightful owner of it, and when the unclaimed shares are found in the possession of the bankrupt it is only fair to accept the general presumption in favor of fair dealing and to decide in the absence of countervailing proof, that the broker out of his funds has supplied the deficiency for the benefit of his customer which he had a perfect right to do."

In *Sexton vs. Kessler*, 225 U. S., 90 (May 27, 1911), Kessler & Co., Ltd., of Manchester, England, had had intimate dealings with Kessler & Co., a New York house engaged in banking and foreign exchange, and by agreement between them the latter set aside some securities in escrow as security for its drawing account with the former. The securities were placed in the vault of the New York house in a package marked

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* Italics ours.

"Escrow for account of Kessler & Co., Limited, Manchester". This was done in 1903. Under their agreement the New York house might withdraw any securities from this package, substituting others of equal or better quality, and various of the securities were taken out by the New York house and others substituted. When the stability of the New York house became doubtful in the panic of 1907, an agent of the English house demanded and received from the New York house, October 25, 1907, the securities thus carried in escrow, and on November 27, 1907, the New York house was adjudged bankrupt. Sexton, Trustee, sued to set aside the transfer as an alleged fraudulent preference. But this court held the transfer legal, and referring to the doctrine in Richardson vs. Shaw, *infra*, said through Mr. Justice HOLMES (pp. 97, 98):

> "But the decisions of this court and of New York agree that there may be title in a stronger case than this. When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet as he is bound to keep stock enough to satisfy his contracts, as the New York firm in this case was bound to substitute other security if it withdrew any, the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference, *Richardson v. Shaw*, 209 U. S., 365. *Markham v. Jaudon*, 41 N. Y., 235. So a depositor in a grain elevator may have a property in grain in a certain elevator although the keeper is at liberty to mix his own or other grain with the

deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned."

In *Richardson vs. Shaw*, 209 U. S., 365 (April 6, 1908), Shaw had a speculative account with A. O. Brown & Co., stock brokers, for the purchase and sale of stocks on margin, and deposited $500 as margin with Brown, who purchased for Shaw securities costing $3,987.50, which were charged to Shaw's account. Shaw agreed that Brown might carry in his general loans the securities carried in Shaw's account or deposited to secure the same. From time to time Shaw paid Brown other sums of money as margins, but it was agreed that Shaw might withdraw at any time any money or securities in excess of a margin of 10 per cent. On June 24, 1903, Shaw's agent learned of Brown's precarious financial condition, and as Shaw's margins then exceeded by $5,000 the margin of 10 per cent. agreed upon, the agent demanded and received $5,000 in cash from Brown. The next day Shaw's agent demanded final settlement of Brown, who was then insolvent within the meaning of the bankruptcy law and had been for the two preceding months. On June 26, the liquidation of this account was effected as follows: Brown, the bankrupt, endorsed to Brown, Riley & Company (a firm with which Brown had transacted much of his general business), a note of $5,000 made by one of his debtors and gave them a check for $1,200, thereby increasing his margin on the general loan which he had with Brown, Riley & Co., and agreed that $10,664.13 should be charged against his margin and credited to Shaw, who gave a check to Brown, Riley & Co. for $34,919.62 and received securities of the value of $45,583.75. None of the certificates of stock which Shaw received were the identical ones which he had delivered to Brown as margin.

On the day of settlement Brown had a number of general customers in transactions for the purchase and

sale of stocks similar to those had with Shaw. Brown assigned July 27, 1903, and Richardson, trustee, thereafter brought suit to recover $5,000 paid Shaw as a preference to the other creditors of Brown, and also to recover $10,664.13, being the amount Brown transferred for Shaw's benefit in the above settlement.

But it was held that there had been no preference; that the relation of a broker and customer is that of pledgee and pledgor (declining to follow the Massachusetts theory of debtor and creditor); that this was a mere redemption which the broker was bound to carry out; that, all shares being alike, it is not necessary to have the identical certificates received on the trades of the particular customers; that insolvency does not change the broker from pledgee to debtor; and that even after insolvency the broker had a right to use his estate to redeem the stocks. The Court says, at pages 377, *et seq.*:

> "The rule thus established by the courts of the State where such transactions are the most numerous, and which has long been adopted and generally followed as a settled rule of law, should not be lightly disturbed, and an examination of the cases and the principles upon which they rest lead us to the conclusion that in no just sense can the broker be held to be the owner of the shares of stock which he purchases and carries for his customer. While we recognize that the courts of Massachusetts have reached a different conclusion and hold that the broker is the owner, carrying the shares upon a conditional contract of sale, and, while entertaining the greatest respect for the Supreme Judicial Court of that State, we cannot accept its conclusion as to the relation of broker and customer under the circumstances developed in this case. We say this, recognizing the difficulties which can be pointed out in the application of either rule. * * *
>
> "It is objected to this view of the relation of

customer and broker that the broker was not obliged to return the very stocks pledged, but might substitute other certificates for those received by him, and that this is inconsistent with ownership on the part of the customer, and shows a proprietary interest of the broker in the shares; but this contention loses sight of the fact that the certificate of shares of stock is not the property itself, it is but the evidence of property in the shares. The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named.

"A certificate of the same number of shares, although printed upon different paper and bearing a different number, represents precisely the same kind and value of property as does another certificate for a like number of shares of stock in the same corporation. It is a misconception of the nature of the certificate to say that a return of a different certificate or the right to substitute one certificate for another is a material change in the property right held by the broker for the customer. *Horton v. Morgan*, 19 N. Y., 170; *Taussig v. Hart*, 58 N. Y., 425; *Skiff v. Stoddard*, 63 Connecticut, 198, 218. As was said by the Court of Appeals of New York in *Caswell v. Putnam*, 120 N. Y., 153, 157, one share of stock is not different in kind or value from every other share of the same issue and company. They are unlike distinct articles of personal property which differ in kind and value, such as a horse, wagon or harness. The stock has no earmark which distinguishes one share from another, so as to give it any additional value or importance; like grain of a uniform quality, one bushel is of the same kind of value as another.'

"Nor is the right to repledge inconsistent with ownership of the stock in the customer (*Skiff v. Stoddard*, 63 Connecticut, 216, 219; *Ogden v.*

Lathrop, 65 N. Y., 158). It was obtained in the present case by a contract specifically made and did not affect the right of the customer, upon settlement of the accounts, to require of the broker the redemption of the shares and their return in kind.

"It is true that the right to sell, for the broker's protection, which was not exercised in this case, presents more difficulties, and is one of the incongruities in the recognition of ownership in the customer; nevertheless it does not change the essential relations of the parties, and certainly does not convert the broker into what he never intended to be and for which he assumes no risk, and takes no responsibility in the purchase and carrying of shares of stock. * * * (pp. 378, 379).

"We reach the conclusion, therefore, that although the broker may not be strictly a pledgee, as understood at common law, he is, essentially, a pledgee and not the owner of the stock, and turning it over upon demand to the customer does not create the relation of a preferred creditor within the meaning of the bankrupt law" (p. 380).

And in summarizing the transaction alleged to be a preference, the Court said (p. 384):

"How, then, stood the parties at the time of the demand for the return of these shares of stock? They were held upon a contract which required the broker upon demand to turn over the shares purchased or similar shares to the customer upon payment of advances, interest and commissions. These stocks were redeemed and turned over to him; as a consequence the relation of debtor and creditor as between broker and customer did not arise. Upon the principles heretofore discussed we think the payment of the $5,000 on June 24

was not a preferential payment to a creditor. The customer had demanded settlement, the broker had paid the $5,000, and on the following day this sum was taken into account in settling the account before turning over to the customer the stock belonging to him according to the understanding of the parties."

Justice HOLMES in a concurring opinion said, at pages 384, 385 :

" If I had been left to decide this case alone, I should have adhered to the opinion which, upon authority and conviction, I helped to enforce in another place. I have submitted a memorandum of the reason that prevailed in my mind to my brethren, and as it has not convinced them I presume that I am wrong. I suppose that it is possible to say that after a purchase of stock is announced to a customer he becomes an equitable tenant in common of all the stock of that kind in the broker's hands, that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customers' claims, and that the *nature of the stock identifies the fund as fully as a grain elevator identifies the grain for which receipts are out.* It would seem to follow that the customer would have a right to demand his stock of the trustee himself, as well as to receive it from the bankrupt, on paying whatever remained to be paid. A just deference to the views of my brethren prevents my dissenting from the conclusion reached, although I cannot but feel a lingering doubt."

Rule of These Cases Applies to Present Case.

The foregoing cases establish :

(1) That the relation between customer and broker is that of pledgor and pledgee, not of creditor and debtor, and the customer owns the stock ;

(2) That a certificate of shares of stock is not the property but the evidence thereof, and that one share is as good as any other share of the same stock, being likened to grain in the bin.

(3) That when a stockbroker is obligated to carry a particular stock for customers, and upon his bankruptcy stock of that kind is found in his box, not allocated to any account, it is presumed, unless there is proof to the contrary, that the stock so found is there to fulfill his obligation to his customers " long " of such stock , and those customers may take it irrespective of when or how the certificate was received.

And we submit that

(4) Where there is more than one customer and the amount of stock found on the broker's premises is less than that of which they were " long," they are entitled under the foregoing cases to take the stock *pro rata* with their respective claims.

The 100 shares of Copper stock found in the box of Hollins & Co. were unmarked, free of pledge and it is conceded that Hollins & Co. had no interest therein except as pledgees. The presumption would be strong that Hollins & Co. placed such stock in their box to carry out their obligations to their customers who were " long " of Copper stock. Such a presumption was deemed sufficient in Gorman vs. Littlefield, and the other cases, *supra*. But here it is re-inforced by actual proof. Allaire, the cashier of Hollins & Co., testified that the brokers had on hand on November 7, 1913, 100 shares of Copper, represented by two certificates of 50 shares each, " then held for the account of their ' long ' customers " (Record, pp. 17–18) ;

and that later Hollins & Co. received the 100 share certificate which they placed "in their safe-deposit box, where it remained until the filing of the petition in bankruptcy. The said certificate No. 29373 was never marked or otherwise identified by Hollins & Co. as the property of any particular person or customer, or placed in any envelope bearing any indication that the said stock was held for the special account of any particular customer or person, and no memorandum appears upon the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person" (Record, p. 18).

Commenting on this, the District Judge said:

> "Nor is there here any countervailing proof,—indeed this record is more favorable to Hollins' customers in Copper than was the evidence in Gorman's case. It is uncontradicted that on November 7th, Hollins had on hand 100 shares,—'for account of their long customers'" (Record, p. 24).

The facts are identical with the Gorman case excepting that here there is more than one customer and an insufficiency of stock, while in the Gorman case there was only one customer and a surplus of stock.

It is our contention that the doctrine in the Gorman case cannot be withheld,—that the customers own the stock none the less and may take the same *pro rata* with their claims. It will not be doubted that if either of the appellants applied to Hollins & Co. before bankruptcy for his Copper stock and paid any debit balance due, he would be entitled to take out of the 100 shares in the box so much as equalled the amount of stock of which he was 'long.' Hollins & Co. could force the customer to take that stock even if the certificate were not acquired in connection with the customer's order; and further, if Hollins & Co. did not have such stock on hand, they would be entitled to use

their money in the open market to buy other stock of that kind to make delivery to the customer.

The circumstance of there being two customers instead of one and of a deficiency instead of a surplus of stock can not concern the essence of the doctrine of the Gorman case, but only the *quantum* of relief flowing from its application. This was plain to the District Judge, and his conclusion seems inevitable.

His consideration of the point seems all the more apposite since it was he who in the first instance decided the Gorman case adversely to the claim that certificate identification is unnecessary, which, after being also rejected by the Court of Appeals, was established in this court.

In his opinion, HOUGH, J., says (Record, pp. 23, 24):

> "This claim is the legitimate aftermath of Gorman v. Littlefield, 229 U. S., 19, if that decision logically follows Richardson v. Shaw, 209 U. S., 265, and Sexton v. Kessler, 225 U. S., 90. That there is such logical sequence Justice DAY's opinion asserts, and it seems to me plain enough.
>
> "All these controlling cases fully accept the 'grain-elevator' doctrine respecting stocks, so that a customer who finds any stock of the kind he bought on his broker's premises can claim what he finds, for it is 'unnecessary * * * to put his finger on the identical certificates purchased for him.'
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> * * * * * *
>
> "If there were 280 (or more) shares of Copper in the Receiver's hands the Gorman case would be plainly applicable—but there are only an hundred, and that fact is said to entail both a difference and distinction.
>
> "It is true that DAY, J., twice referred to the presence of shares sufficient to satisfy the demand of the petitioner Gorman,—as if that fact were significant. It was significant, after the fic-

tional presumption had been made ; that what the brokers had on hand, was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares, acquiring the exact amount taken, is quite significant of intent to make good the wrong done.

" But if by dwelling upon number of shares on hand, anything more than this was meant, the logical symmetry of fictions on which the decision rests is seriously impaired,—to say the least.

" If stock purchasers dealing in a given stock at a given broker's, are entitled to regard his aggregate purchasers as so much grain in a bin (at least until he allots the stock in specie, if there is such a thing) ; and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of ' stock-grain ' is intended to fill up the bin again ;—what difference can it make when the broker is surprised by bankruptcy the bin is full or half full, or as here $\frac{1}{2}\frac{0}{8}$ full ?

" Again it is urged that Gorman's case did no more than relax the rules of identification. Gorman was refused any stock in this Court, because he could not identify as his the stock on hand, but the very ground of decision in the Supreme Court is that no identification is necessary,—the presumption of restitution plus the physical presence of some stock, supplies the lack,—' in the absence of countervailing proof.' To call what occurred in Gorman's case identification, is playing with words."

" Nor is there here any countervailing proof,—indeed this record is more favorable to Hollins' customers in copper, than was the evidence in Gorman's case. It is uncontradicted that on November 7th, Hollins' had on hand 100 shares

' for account of their long customers.' They were used to ' carry ' Shatzkin,—that they emerged from that transaction in different certificates, but unchanged in their relation to Hollins', needs no exposition in a community much too familiar with transactions such as have here been outlined.

" In short, if one deals with facts instead of fictions, it is true that any customer who had applied for his copper before bankruptcy would have gotten these 100 shares, or the proper part thereof.

" The effect of bankruptcy is, that all apply together,—and so all must share *pro rata.*"

Because the doctrine affirmed in Gorman vs. Littlefield has been so definitely established in this court it seemed inappropriate to mention similar rulings of other courts. But it may be permissible to refer to Skiff vs. Stoddard, 63 Conn., 198 (1893), in view of its express approval by this court in Richardson vs. Shaw, *supra**, because of its *similarity to this case in the precise circumstance of there being more than one customer and an insufficiency of stock.*

Skiff vs. Stoddard involved various classes of claims by customers of Bunnell & Scanton, stock brokers in New Haven, who transacted for local customers the usual business of buying and selling securities on the New York Stock Exchange through New York corres-

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* In referring to the relation of pledgor and pledgee between customer and broker this court said :

" The subject was fully considered in a case which leaves nothing to be added to the discussion, Skiff v. Stoddard, 63 Conn., 198, in which the conclusions in Markham v. Jaudan were adopted and approved " (p. 376).

" The broker cannot be converted into an owner without a perversion of the understanding of the parties, as was pertinently observed in the very able discussion already referred to in Skiff vs. Stoddard, 63 Connecticut, 216" (p. 379).

pondents. When the brokers assigned, various securities were found in their possession. Some were capable of certificate identification as the precise certificates received in execution of the customer's order, some were capable of identification as those substituted by the brokers for the original certificates received for the customer; and some were not capable of either of the foregoing identification but merely as stock of the kind which the brokers were obligated to carry for the customers. It was held in respect of the securities capable of identification as the original certificates received for the customer, or as those substituted therefor, that the customer was entitled to take the same and in precedence of a merely general identification which would apply where this precise identification was not possible.

The court then proceeded to consider the case where neither of the above identifications was possible but where blocks of the certain stock which the brokers were obligated to carry for various customers were found in an amount not sufficient to satisfy their claims in full.

It is for its treatment of this point that we refer to the opinion in Skiff vs. Stoddard. The court observed that the preliminary cases where certificate identification was possible presented no difficulty. But where such identification is not possible, it held that the customers might take the stock found in the brokers' premises, of the kind of which they were "long," *pro rata* in satisfaction of their claims; and where not enough stock of that kind was found to satisfy them in full, they might take such lesser amount *pro rata* in part satisfaction.

It was held that the customers were pledgors of such stock; that they owned the shares; that certificate identification was unnecessary; that as the amount of stock on hand was insufficient to satisfy all the customers in full they were entitled to reclaim the stock *pro rata* according to their respective rights, and that

in so doing the rights of the general creditors or of the estate of the brokers were not infringed.

"There remains the single question as to what shall be done when it appears, after all efforts at precise identification have been exhausted, and after the claims of Bunnell & Scranton as purchasers have been cut off, that there remains a block of stock insufficient to meet the demands of all the pledgors of that stock. There is a shortage which must fall to the loss of somebody. Are there priorities of right as between customers? or must the claims of all fail? or what shall be done to accomplish the equitable result? The customers of Bunnell & Scranton, as we have already seen, divide themselves into two classes, creditor customers and debtor customers. It is claimed that the creditor customers have rights superior to those of the debtor customers, and that the former are entitled to first satisfy their claims of stock, for the reason that the stocks of the latter may be regarded as having practically fallen in to the firm. We think otherwise. At the time of the failure of Bunnell & Scranton all were alike customers for whom stocks were held by the firm in pledge. The legal relation of all to the stocks carried for them was precisely the same. By the appointment of the defendant as trustee the rights of creditors have become interposed. In the presence of their rights it cannot be said that events which may have succeeded the assignment have operated to give the plaintiffs new and enlarged rights. The situation must be regarded as it existed when the assignment was made. *This situation discloses blocks of stock identified as held and carried under pledges for more than one person. None of the stocks belongs to Bunnell & Scranton. It is not possible to show to whom it share by share does belong. The shares are all*

alike. We think that the identification is sufficient to justify, and that equity requires, the division, of the stock pro rata, among all those for whom Bunnell & Scranton were holden to carry such stock. This course fully protects the creditors of Bunnell & Scranton. No stock is taken from the assets of the firm to which it was ever by any possibility entitled. It gives the pledgors their rights as far as may be, and in an equitable manner" (pp. 228, 229).*

The Opinion of the Circuit Court of Appeals.

The Court of Appeals was impressed by the circumstances that there were more than one customer and a deficiency of stock. They say when speaking of the Gorman case "that certificates were found in the bankrupt's possession in amount greater than should have been on hand for this customer and the significant fact is shown that no other customer claimed any right in those shares of stock."

Surely the quantitative or numerical features of the case as to customers or shares have nothing to do with the underlying doctrine of the ownership by the customers of the shares, and of the identity of one share with another. No better answer to the Court of Appeals could be made than Judge HOUGH'S treatment of this point (Rec., p. 23):

> "It is true that DAY, J., twice referred to the presence of shares sufficient to satisfy the demand of the petitioner Gorman—if that fact were significant. It was significant after the fictional presumption had been made; that what the brokers had on hand was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares,

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* Italics ours.

acquiring the exact amount taken, is quite significant of intent to make good the wrong done.

"But, if by dwelling upon number of shares on hand, anything more than this was meant, the logical symmetry of the fictions on which the decision rests is seriously impaired—to say the least.

"If stock purchasers dealing in a given stock at a given broker's, are entitled to regard his aggregate purchases as so much grain in a bin (at least until he allots the stock in specie, if there is such a thing); and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of 'stock-grain' is intended to fill up the bin again—what difference can it make that when the broker is surprised by bankruptcy the bin is full or half full, or as here $\frac{10}{28}$ full?"

It is probable that the Court of Appeals was misled by its attachment to the old rule of certificate identification. It attempted in its opinion to trace the identity of certain certificates which the evidence showed had come in and gone out of the possession of Hollins & Co.

Referring to Bamberger, it said (Record, p. 37):

"every one concedes that his 30 shares are represented by the certificate for that amount held by the bank."

There is no such concession in the record, nor was it ever made. It is doubtful whether Bamberger could trace the certificate received on the execution of his order of 30 shares to the certificate pledged in the loan with the bank. But whether he could or not is unimportant, and has nothing to do with the rights of Appellants who have not sought to have him take such course or to eliminate him from proceeding with them ratably against the 100 shares involved in these appeals. It is immaterial to them which Bamberger

may do. He cannot do both. And here again the Court of Appeals was misled in seeming to think, as it stated, that " the application of the theory followed in this case leads us to a curious result * * *. The identity of this certificate as Bamberger's is conclusively proved, every one concedes that his 30 shares are represented by the certificate for that amount held by the bank. Nevertheless under the theory now contended for, $\frac{30}{280}$ths of his 30 shares are also identified as a fractional part of another certificate for 100 shares; to that extent $\frac{30}{280}$ths, there would be a double identification " (Record, p. 37).

There is no identification by Bamberger of these shares. *But if he had claimed and taken those 30 shares, the only effect would be to increase the number of shares which Appellants would be entitled to take out of the 100 shares here involved.* There could not be a double identification.

The Court of Appeals labored under its cherished notion that the case hinged upon certificates instead of shares. It refused to consider that certificates are different; that shares are alike. A customer's claim is not to stand or fall on certificates. His right is against the shares.

Under the Gorman case a broker may satisfy his obligation to the customer by compelling him to take any shares of the same kind of stock of the number to which entitled whether bought for the customer or not. The converse is also true that the customer may enforce his rights against any shares in the hands of the broker.

But the Court of Appeals adhered to the effort to trace certificates, instead of confining itself to the right of the customers in shares. It said (Rec., p. 37):

> " Examining the record, especially the book entries in Exhibit 'A', we find much force in the contention of appellants that at the time of the bankruptcy, 50 of Landau's shares were hypothecated with the Trust Company, Duel's

100 shares had been used for delivery under a 'short' order, *i. e.*, loaned to the 'short' customer and 50 of Landau's shares and Wiener's 50 shares were in the box.

"But it is not necessary to decide that question; Landau is making no claim that this particular certificate for 100 shares is his property."

How completely it mistook the facts appears from the statement that they found much force in the contention that "*Wiener's 50 shares were in the Box.*" Appellant's have never claimed this nor is there any evidence of it in the record. On the contrary it was stated in Appellants', Wiener, Levy & Co.'s answer, that the certificate received on the purchase made to fill their order passed from the possession and control of Hollins & Co., on or about June 13, 1913, against a sale of capital stock of Amalgamated Copper Co. for and on behalf of another customer of H. B. Hollins & Co. (Record, p. 11).

Appellants, Wiener, Levy & Co., claimed and claim that they are entitled *pro rata* with other customers "long" of Copper, to at least a $\frac{5}{25}$ths interest in the 100 shares certificate.

It is incomprehensible how the Court of Appeals could state that "Wiener's 50 shares were in the box" in one breath, and in the next hold that Wiener, Levy & Co. had no interest in the shares in the box.

The Court of Appeals approached the case with the idea which found expression in their opinion

> "that the rights of general creditors are likely to be seriously impaired if the theory of constructive identification based on presumption of intent, be carried to the extent here asked for" (Record, p. 38).

But the rights of general creditors have nothing to do with the rights of customers who deal in particular stocks. The Court of Appeals is answered finally by

the language of this court, in Gorman vs. Littlefield, that

> " furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner, or the application to the general estate of property which never rightfully belonged to the bankrupt " (p. 25).

The Court of Appeals likened the case at bar to the case *in re* McIntyre & Co., Petition of Grace, 181 Fed., 960, in which a petition of *certiorari* was denied in this Court (Grace vs. Burlingham, 218 U. S., 672).

This case is utterly unlike *in re* McIntyre, and it is inconceivable how the Court of Appeals could perceive a similarity.

In that case, McIntyre & Co., brokers, had failed, and had customers " long " of 1,651 shares of a certain stock. The total amount of this stock found on the broker's premises after bankruptcy, was 2 shares in the vault and 105 shares in pledge, 95 being in one loan and 10 in another. Grace was long of 200 shares and tried to take the 95 shares out of this loan, without regard to the claims of other customers to 1,451 shares.

Grace also attempted to prove particular identification regarding these shares pledged in the bankrupt's loan. There was no attempt by Grace to pro rate her claims with that of the other customers entitled to 1,451 shares as in this case. The petition for *certiorari* in the Grace case was before this Court, October 17, 1910, prior to the decision in the Gorman case (May 26, 1913).

In the present case there is no effort on the part of any one customer to infringe upon the claims of any

other customer 'long' of Copper stock. On the contrary the appellants have claimed only the portion to which they are *pro rata* entitled, so as to avoid any possible conflict with the claims of other customers similarly entitled. They have claimed no more than the language of Mr. Justice HOLMES would vouchsafe them as an "equitable tenant in common of all the stock of that kind in the broker's hands; that the broker's powers of disposition, extensive as they are, are subject to the duty to keep stock enough on hand to satisfy his customers' claims and that the nature of the stock identifies the fund as fully as the 'grain elevator identifies the grain' for which receipts are out" (Richardson v. Shaw, *supra*, p. 378).

Our broad position in the District Court and in the Court of Appeals, was that we had nothing to do with tracing certificates or trust funds. *We* were the owners of shares of stock and certificates were only the evidence thereof; the shares found in the broker's box belonged to no particular customer, but were put there by Hollins & Co. for account of their customers "long" of Copper; and the appellants claimed the amount awarded them in the District Court as the amount of their *pro rata* interest in the shares in the box. *Their personality, plus the character of the shares, identified the fund to which they were entitled.* As was said by Justice HOLMES in National City Bank vs. Hotchkiss, 231 U. S., 50:

> "In both Gorman v. Littlefield, 229 U. S., 19, and Richardson v. Shaw, 209 U. S., 365, in addition to the personality of the holder there was also a specific stock which identified the fund relied upon and separated it from the general mass of the estate" (p. 58).

We submit that the Circuit Court of Appeals erred in reversing the order of the District Court and in refusing to accept the doctrine of Gorman vs. Littlefield and other cases cited, as controlling in this case.

II.

The decree of the Circuit Court of Appeals for the Second Circuit should be reversed and the order of the District Court affirmed.

Respectfully submitted,

CARL A. DEGERSDORFF,
STUART MCNAMARA,

Of Counsel for Appellants Wiener, Levy & Co.

Supreme Court of the United States.

OCTOBER TERM, 1915.

ARTHUR B. DUEL, APPELLANT,

vs.

HARRY B. HOLLINS *et al.*, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER, — No. 352

WIENER, LEVY & CO., APPELLANTS,

vs.

HARRY B. HOLLINS *et al.*, INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER. — No. 353

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Brief on Behalf of Appellants Arthur B. Duel and Wiener, Levy & Co.

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Supreme Court of the United States,

OCTOBER TERM, 1915.

ARTHUR B. DUEL, Appellant, *vs.* HARRY B. HOLLINS *et al.*, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts, and A. Leo Everett, Receiver.	No. 352.
WIENER, LEVY & CO., Appellants, *vs.* HARRY B. HOLLINS *et al.*, Individually and as Members of the Firm of H. B. Hollins & Co., Alleged Bankrupts, and A. Leo Everett, Receiver.	No. 353.

Reply Brief on Behalf of Appellants Arthur B. Duel and Wiener, Levy & Co.

We are reluctant to extend the case by further briefs, but we believe that the elimination of cer-

tain erroneous statements and presumptions of fact, and immaterial legal contentions, appearing in the Appellees' argument, may serve to clarify the issue and restore the case to its proper narrow scope; and with this purpose we beg to submit the following short memorandum in reply:

Criticism of Appellees' Statement of Facts.

At page 3, it is stated that on November 13th, Hollins & Co. "had in their possession or under their control *or loaned pursuant to agreement* * * * 280 shares of Copper,". We find no foundation in the record for the italicized words, which are followed by the statement that 100 shares of Copper had been *loaned* to a customer (Hutchinson) on October 10th, 1913, to carry a "short" sale. All that the record shows is that Hollins acknowledged that Hutchinson was "short" of 100 shares of Copper on Oct. 10th, 1913. There is no proof that this "short sale" was executed, or if it were, that stock belonging to customers was used to consummate this "short" sale. The assertion of the Appellees that this transaction resulted in a *loan* to the "short" customer is advanced to sustain the claim that Hollins & Co. were not "short" of stock which they should have been carrying for their long customers, and to form a basis for the claim, later made, that it is a "tenable presumption" that Duel's 100 shares were used to consummate Hutchinson's "short" sale: we refer to this latter claim in our reply to Appellees' Point V.

The next statement of fact criticised appears in Appellees' brief, (p. 4) where it is said that "it appears from the account (Record, p. 20, Table 37,) that the *certificates for the 200*

shares so purchased for Landau and Ulrich on October 28th, 1913, were delivered upon receipt by Hollins & Co. to complete Schatzkin's "short sale." We submit that the record contains no foundation for this statement. There is no evidence that any certificates were received on the day on which Hollins & Co. acknowledged themselves obligated to carry for Landau and Ulrich 100 shares each, viz., October 28, 1913, or on the next delivery date. The paragraph in question proceeds to state that, on the covering of Schatzkin's "short" sale, 100 shares were received, which were placed in the box, and the inference is drawn that, Ulrich having sold his 100 shares meanwhile, the certificate in Hollins' box on October 31st, represented the certificate originally purchased for Landau on October 28th. The statement is then made: "*That was the first time they ever had a certificate for those shares.*" In other words, it is admitted that the transactions of October 28th did not result in the receipt of any certificate representing Landau's purchase. How then can it be said that a certificate received three days later "represented the certificate originally purchased for Landau on October 28th"?

This is the basis for the contention later made in the Appellees' brief (Point V) that the shares purchased for Landau were traceable to the 50 shares in the loan with The Kings County Trust Company, and to 50 of the 100 shares in the box on November 13th, when the petition in bankruptcy was filed. As we show later, at pages 13 and 14, appellees' contention is not supported by the record.

On pages 7 and 8, the statement is made that the appellants offered no proof in support of the allegations that, at bankruptcy, Hollins & Co. did

not have any certificate representing shares of Copper stock *separately and specifically carried for their accounts;* and further that the Receiver has alleged that he did not have information sufficient to form a belief as to how the shares of Amalgamated Copper Company were carried by Hollins & Co. This statement is misleading. In paragraph Sixth of Duel's petition (Record, p. 3), it is alleged that Hollins & Co. at bankruptcy did not have in their possession or under their control certificates for Copper stock "separately and specifically carried for the account of your petitioner," *and the answer of the Receiver does not deny this portion of the paragraph in question,* but merely denies the balance of the paragraph to the effect that the petitioner is the owner of an undivided 100/280th in the 100 shares of Copper stock in the possession of the Receiver. This allegation was, therefore, admitted, and no proof thereof was required. A similar allegation in the answer of Weiner, Levy & Co., paragraph 5 thereof (Record p. 11), was not denied. Moreover, the affidavit of Allaire furnishes, we submit, ample proof in support of these allegations. (Record, p. 16, *et seq.*)

Point I of Appellees' Brief (pp. 8-24).

It is first pointed out (p. 9), that the District Judge was in error in holding that on November 7th, Hollins & Co. had converted 150 shares of Copper, belonging to long customers. The court was in error as to the exact date, but on November 13th it was true that Hollins & Co. were owing 280 shares to customers and had but 100 shares in their box and 30 shares loaned with the Bank of Commerce pursuant to agreement with

Bamberger. They had pledged 50 shares with the Kings County Trust Company, whether with or without authority does not appear in the record, so that they had but 130 shares on hand or loaned pursuant to agreement, so far as the record shows. This error in date is of no importance, and the situation on November 7th of no significance. The significant fact is that they had, as the District Judge stated, *in possession* on bankruptcy 100 shares and the bin was, therefore, 10/28ths full.

The Appellees then admit that the District Judge was correct in his conclusion as to the state of the bin on the facts stated by him, but advance the fanciful theory that the bin was not 10/28ths full, "but that there were four bins containing 280 shares of Copper", and ask that the appellants prove "which bin or bins their shares went into" (p. 11). It is asserted that "all parties concede that Hollins & Co. had completely fulfilled their obligations". The record discloses no such concession, and it should be noted that neither the District Judge nor the Circuit Court of Appeals so found. On the contrary, the Circuit Court of Appeals decided the case on the theory that there was *a deficiency of stock*, and that, therefore, *Gorman* vs. *Littlefield*, 229 U. S. 19, did not apply. This is the interpretation placed on the decision of the Circuit Court of Appeals by subsequent decisions. (See opinion of former Judge Holt, as Special Master. Appellees' Brief, pp. 16 and 17).

But the appellees now claim that Hollins & Co. had, at all times, stock sufficient to satisfy their customers' demands, and repudiate the ground adopted by the Circuit Court of Appeals for its decision.

Attention is especially directed to the following statement on page 12 of appellees' brief:

> "We only ask the appellants to prove that no certificates were specifically allotted to them and that Hollins intended to hold all of the Copper stock for the joint benefit of all customers owning it, or to point out the certificates which were not allotted to anyone".

This challenge can be accepted and fully met. As we have heretofore shown, it was pleaded in paragraph Sixth of Duel's petition (Record, p. 3), that no Copper certificates were held on November 13th, separately and specifically carried for the account of Duel; and Wiener, Levy & Co. pleaded likewise (Record, p. 11). There is no denial thereof, and, by failing to deny, the Receiver has admitted such allegations (Record, p. 9). Allaire says that the 100 shares, used by Hollins & Co. on November 8th to carry, in part, Shatzkin's "short" sale, were *"then held for the account of their long customers"*, and that this 100 shares, by the covering of Shatzkin's sale on November 10th, were returned through the clearing house operation to Hollins & Co., and the certificate therefor placed in their box, where it remained until the petition in bankruptcy was filed. He further says that the certificate last received was never marked or identified as the property of any particular customer or placed in any envelope bearing any indication that the stock was held for the special account of any particular customer or person, and that no memorandum appears on the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person (Record, p. 18). This, to-

gether with Allaire's further statement (Record p. 19), as to the practice of Hollins & Co. to use certificates in making deliveries indiscriminately, and that the certificate representing the 100 shares in controversy was received "in the usual course of business", as representing the balance of Copper stock due Hollins on balance on that day, is ample evidence that the 100 shares in controversy was held for the joint benefit of their customers "long" of Copper stock, and cannot be claimed by any particular customer or person. There is no countervailing proof as to this.

The challenge is, therefore, fully met and disposed of. The appellees have, we submit, stipulated themselves out of court.

But the appellees say (Record, p. 15) that the Gorman case is distinguishable on the ground that Gorman was not a margin customer. But a margin customer is just as much the owner of stock as one who has paid for the same in full (*Richardson* v. *Shaw*, 209 U. S. 365; *Sexton* v. *Kessler*, 225 U. S. 90). The obligation to keep on hand stock to satisfy the demands of margin customers is quite as binding as in the case of customers who have paid in full. Justice Holmes must have had a margin customer in mind in *Richardson* v. *Shaw*, when he said at page 385 (italics ours):

> "It would seem to follow that the customer would have a right to demand his stock of the trustee himself as well as to receive it from the bankrupt *on paying whatever remained to be paid.*"

Appellees assert (p. 16) that the further presumption must be indulged in that Hollins did not allocate any certificates to particular cus-

tomers. Why are presumptions necessary when the facts are undisputed? That Hollins did not allocate Copper certificates to particular customers is fully shown by Allaire's affidavit (Record pp. 18, 19).

The balance of appellees' Point I is devoted to the discussion of cases dealing with the tracing of trust funds, which have no possible bearing on the question under discussion.

We refer, however, to the concluding suggestion in this point to the effect that there is no proof that a clearing house has been established on the New York Stock Exchange. Counsel must again have overlooked Allaire's affidavit, in which the affiant repeatedly refers to the clearing house operation and to the fact that Hollins & Co. received stock as the result of the balance found due them by the clearing house (Record, pp. 18, 19). The effect of a clearing house operation is known to every court, and the operation does not differ in respect to stock, checks or grain. It is merely a method of offsetting debits and credits between members to dispense with unnecessary deliveries or payments.

Point II of Appellees' Brief (pp. 25-29).

On page 25, it is observed "In every case of customers tracing securities, identification of particular certificates has been required, as we have seen." As this extraordinary statement is directly contrary to the cases that follow it, no further comment is necessary.

The only case approving certificate identification by this Court which is referred to in the appellees' brief, is *Thomas* v. *Taggard* (p. 28),

where the customer had deposited as collateral the particular certificates which were later found in the possession of the Trustee in bankruptcy.

Point III of Appellees' Brief (pp. 29-38).

It is unnecessary to comment at length on the argument involved in this point, except to observe that the appellees concede (p. 30) *that a deficiency in shares is not a ground for distinguishing the Gorman case from this case;* and to point out that, even conceding that Hollins & Co. in pledging stocks should have allocated stocks to particular customers to avoid pledging stocks for more than the amounts loaned to customers thereon (if they did so pledge, which does not appear), nevertheless Allaire's affidavit effectually removes the foundation from this argument, as he says that Hollins & Co. *did not allocate stocks to margin customers.* (Record, p. 19.) Why speculate as to Hollins & Co.'s duty to allocate, when it is undisputed that they did not do so?

The appellees recognize this difficulty, when they say, p. 37 (italics ours):

> "But it is claimed that, even if the 30 shares in question were identified (by Bamberger), the claimants to the remaining 250 shares of Copper stock are entitled to their *pro rata* in the 100 shares in the possession of the Receiver."
>
> "There is no more logic in this contention than there was in the original one *unless appellants prove affirmatively that the brokers did not allocate particular certificates for particular customers,* ".

Point IV of Appellees' Brief (pp. 39-45).

This point deals with the effect of Section 956 of the Penal Law of New York, and it is argued that this statute practically requires a broker to allocate stock. It is only necessary to say that a most casual reading of the statute shows that it has no such effect. All that the statute prohibits is the pledging by a broker of stocks held on margin, for more than the amount due thereon, or the disposal of the same for the broker's benefit, without the customer's consent, "without having in his possession or under his control, stocks, bonds or other evidences of debt *of the kind and amount to which the customer is then entitled,* for delivery to him upon his demand therefor and tender of the amount due thereon." We point out in this connection a rather significant omission in the quotation of this statute in the appellees' brief (p. 39). The words omitted, which are there indicated by asterisks, read in the original "and thereby causes the customer to lose, in whole or in part, such stock, bonds or other evidences of debt, or the value thereof". The effect of this omitted clause is to relieve the broker from prosecution under the statute, except where loss occurs.

Point V of Appellees' Brief (pp. 46-53).

The appellees seek to show

First.—That Bamberger's 30 shares were in the Bank of Commerce loan;

Second.—That the 50 shares pledged with the Kings County Trust Company were the property of Landau;

Third.—That, of the 100 shares, free of pledge, in the possession of the Receiver, Landau can claim 50 shares;

Fourth.—That, as to the 100 shares which have been "loaned" for the benefit of a "short" customer, it is "a tenable presumption" that such stock belonged to Duel.

Referring to this last stated claim, appellees assert that the statement annexed to the notice of purchase attached to Duel's petition (Record, p. 6), to the effect, *inter alia,* that the securities carried for the customer "may be loaned by the broker", conferred authority on Hollins & Co. to use Duel's stock to deliver on "short" sales by other customers." An agreement by the customer enlarging the broker's authority in dealing with customer's securities may be inferred in the case of *successive dealings,* but such a notice on a single transaction is insufficient evidence of such an understanding. Campbell on The Law of Stockbrokers, p. 78; citing *Bosoian* v. *Hubbard,* 121 App. Div. N. Y. 510, and other cases.

Even if Duel were bound through silent acquiescence by a single notice appearing at the foot of a notification of purchase, which is contrary to law and reason, it does not result that the words "may be loaned by the broker" were intended, or operate, to authorize the broker to *dispose of the customer's stock to satisfy other customers' "short" sales.*

Campbell says in his treatise above referred to (p. 78-9) that the statement "may be loaned by the broker" is *ambiguous* and that "it should be apparent on the face of the statement that the

broker reserves the right to loan securities for delivery on "short" sales, receiving in exchange the full market price of the securities.

In stock exchange parlance, a loan means the borrowing of stock by a broker who requires it for delivery. in exchange for which stock the borrower must deposit with the person from whom he borrows, the full market value of the stock, as security for its return. To claim that the authority to loan the stock of a customer includes the right to dispose of such stock *without full security* for its return, is rather absurd. While the delivery of stock by a broker to satisfy a "short" sale for a customer is sometimes popularly referred to as a "loan" to such customer, in fact and in law it lacks every element of a *loan,* which word imports an obligation to return. The only obligation of the "short" customer is to keep his margin sufficient; (*Matter of Mills,* 139 App. Div. N. Y. 54, 57-63; Barber *vs.* Ellingwood (No. 1), 144 App. Div. N. Y. 514).

Moreover, the lapse of time, a year, between Duel's purchase and Hutchinson's sale make any such assumption too improbable for serious consideration.

Duel undoubtedly would have secured his 100 shares on demand and payment of his debit balance before bankruptcy, and the claim that his particular stock has been disposed of impresses us as rather disingenuous.

That the Appellees have little confidence in this assertion is evident, as they say in their brief (p. 33) "it may well be that the 100 shares loaned was Duel's property".

All of the other claims as to Bamberger and Landau could be conceded, and yet there would be 50 of the 100 shares free of pledge, for division

between Duel and Weiner, Levy & Co., between whom there is no dispute; which would result in Duel's receiving 33⅓ shares instead of 35.714, and Weiner, Levy & Co. receiving 16⅔ shares instead of 17.857. (See Appellant Duel's principal brief, pp. 29, 30.)

But, as a matter of fact, there is no basis for the claim that Landau can specifically claim 50 of the 100 shares free of pledge.

The attempt to identify as Landau's 100 shares the 50 shares pledged with the Kings County Trust Company and 50 of the 100 shares represented by Certificate No. 29373 (being the stock held by Hollins & Co. free of pledge at bankruptcy) is based upon the assumption that Landau had an exclusive property right in the certificates assumed to have been originally received on the purchase made for him, and that such certificates, to the extent stated, can be traced into the Kings County Trust Company Certificate and Certificate No. 29373.

The Copper account of Hollins & Co. (Record, p. 20, Table 37), shows that on October 28th they charged the account with 100 shares purchased for Landau and 100 for Ulrich and credited the account with 200 shares sold "short" for Schatzkin. So far as these transactions are concerned this is what the Copper account shows and all that it shows. Counsel's assertion (p. 41) that it shows that the 200 shares so purchased for Landau and Ulrich were delivered to complete this "short" sale is merely one of several entirely different inferences that may be drawn from these entries. The Copper account does not show that any certificates were received for either Landau or Ulrich on the purchases made for them, nor that any certificates were delivered on Schatzkin's "short"

sale. It is possible to infer that these entries were mere bookkeeping entries, *i. e.*, that Hollins & Co. bucketed the orders, or that the purchases and sales recorded were made through the Stock Exchange and its clearing house and set off against each other. Even if we accept counsel's inference that certificates were received on Landau's and Ulrich's purchases, and that certificates were delivered on Schatzkin's "short" sale, the Copper account does not show the particular certificates so delivered. The only changes in certificates on October 28th shown by the Copper account are the withdrawal of certificates for 150 shares from the Hanover National Bank and the deposit of certificates for a like amount with the National City Bank. Counsel for appellees disregard this transaction, inferring, we assume, that the certificates deposited with the National City Bank were those withdrawn from the Hanover National Bank. That inference may or may not be correct. It may as easily be inferred that the certificates for 150 shares withdrawn from the Hanover National Bank and certificates for 50 of the shares acquired for Ulrich were those delivered on Schatzkin's "short" sale.

The contention of counsel that the certificate acquired on the closing out of Schatzkin's "short" sale was Landau's sole property, cannot be supported on the theory that Hollins & Co. appropriated it for Landau's exclusive benefit, to make good his loss. There were other customers for whom Hollins & Co. were obligated to carry stock, and the brokers cannot be said to have favored one customer rather than another. At the time the new stock in question was acquired (October 31, 1913), Hollins & Co. were obligated to carry 30 shares for Bamberger,

100 for Duel, 50 for Weiner, Levy & Co., and 100 for Landau, 280 shares in all, and they had in their possession or under their control only 80 shares, of which 30 were pledged with the National Bank of Commerce and 50 were pledged with the Hanover National Bank. There was a deficiency of 200 shares, although "short" sales for that amount were outstanding. In the absence of countervailing proof, it must be presumed, under the doctrine of Gorman *v.* Littlefield (229 U. S. 19), that the 100 shares acquired by the closing out of Schatzkin's "short" sale and placed in the "box" of Hollins & Co. were so placed by Hollins & Co. for the purpose of supplying the deficiency of 200 shares, for the benefit of all of their "long" customers, rather than for Landau's exclusive benefit. Direct proof of that fact is contained in the affidavit of Allaire, who swears that the certificate acquired upon the closing out of the "short" sale above mentioned, and which counsel attempt to trace into the 100 shares involved in this proceeding, was held by Hollins & Co. "for the account of their long customers" (Record, p. 18).

It is unnecessary to proceed further with the history of the transactions which culminated in the situation before us. It is clear that Landau can claim no exclusive property right in any certificate.

Point VI of Appellees' Brief (pp. 54-58).

Point VI of the brief submitted on behalf of Hollins & Co. is that "The rule contended for will impair the rights of general creditors." The complete answer to this proposition is that stocks carried by a broker for his customers are owned by the customers, not by the broker, and it would be

inequitable that such stocks should pass to the general estate of a bankrupt broker merely because difficulties may arise in apportioning such stocks among the customers. Counsel for Hollins & Co. are really attacking the principle established in the case of Richardson *v.* Shaw (*supra,* p. 7), that the legal title to stocks carried by a broker for customers is vested in the customers. As this court said in Gorman *vs.* Littlefield, no creditor can justly demand "the application to the general estate of property which never rightfully belonged to the bankrupt."

Point VII of Appellees' Brief (pp. 58-59).

The appellees' argument that Duel and Weiner, Levy & Co. are not entitled to set-off against the amounts owed by them to Hollins & Co., the market value of the shares not recoverable by them, is without substance. *Matter of MacIntyre, 24 A. B. R., p. 4,* furnishes no support for the appellees' claim. The portion of the report of the special master referred to, dealt with the claim of one Grace whose attempt to identify stock was unsuccessful, and in fixing his claim as a general creditor the amount due by him to the broker was properly offset against the value at bankruptcy of the stock of which he was "long."

It is only necessary to refer to Section 68-a, of the Bankruptcy Act, which clearly authorizes the set-off allowed by the District Court. That Section provides:

> "In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid."

The word "debt" in this provision includes any debt, demand or claim provable in bankruptcy. (Loveland on Bankruptcy, Sec. 317.)

Respectfully submitted,

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19

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 362.

ARTHUR B. DUEL,

Appellant,

vs.

HARRY B. HOLLINS ET AL., INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER.

No. 363.

WIENER, LEVY & CO.,

Appellants,

vs.

HARRY B. HOLLINS ET AL., INDIVIDUALLY AND AS MEMBERS OF THE FIRM OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, AND A. LEO EVERETT, RECEIVER.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF H. B. HOLLINS & CO.,

ALLEGED BANKRUPTS,

Appellees.

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SUBJECT INDEX.

INDEX OF CASES AND AUTHORITIES CITED.

To be argued by
WILLIAM C. ARMSTRONG.

Supreme Court of the United States,

OCTOBER TERM, 1915.

ARTHUR B. DUEL, Appellant, AGAINST HARRY B. HOLLINS *et al.*, individually and as members of the firm of H. B. Hollins & Co., alleged bankrupts, and A. LEO EVERETT, Receiver.	No. 352.
WIENER, LEVY & CO., Appellants, AGAINST HARRY B. HOLLINS *et al.*, individually and as members of the firm of H. B. Hollins & Co., alleged bankrupts, and A. LEO EVERETT, Receiver.	No. 353.

BRIEF ON BEHALF OF H. B. HOLLINS & CO., ALLEGED BANKRUPTS, APPELLEES.

This cause comes on to be heard upon two separate appeals filed on behalf of Arthur Duel and Wiener, Levy & Co. from a decree of the Circuit Court of Appeals for the Second Circuit, dated December 29th, 1914, reversing an order of the District Court of the United States for the Southern District of New York, in Bankruptcy, dated April 3, 1914, which directed the Receiver of H. B. Hollins & Co. to deliver to Duel 35,714 shares, and to Wiener 17,857 shares of stock of the Amal-

gamated Copper Company out of a certificate for 100 shares in his possession, which was in Hollins' "box" at bankruptcy together with dividends upon the said stock (Record, pp. 39, 46, and 25). Duel claimed a 5/14th interest as an "equitable interest in common' in every share of Copper in the possession or control of Hollins' at bankruptcy. Wiener a 5/28th interest.

Statement of Facts.

The "statement of facts" contained in the briefs of the appellants are substantially correct, but in order that the court may be more fully informed it is necessary to add certain additional facts.

When Hollins & Co. purchased 100 shares of Copper for Duel on October 30, 1912, they sent the claimant a notice, the receipt of which is admitted by the claimant and a copy of which was made a part of his petition (Record, pp. 5-6). It read as follows:

"EXHIBIT A.

H. B. Hollins & Co.

New York, Oct. 30, 1912.

Dr. A. B. Duel.

Dear Sir: We beg to advise you that we have this day bought for your account the following named securities:

No. of Shares Bonds	Description	Price	Time	From whom bought
100	Bag & Paper	12	R.	Griesel & Rogers
100	Am'l Copper	82½	R.	Potter Choate

Very respectfully yours

H. B. Hollins & Co.

By S.

It is agreed between broker and customer:

1. That all transactions are subject to the rules and customs of the New York Stock Exchange and its Clearing House.

2. That all securities from time to time, carried in the customer's marginal account, or deposited to protect the same, *may be loaned by the broker* or may be pledged by him either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to the customer." (Italics are ours.)

There is no evidence as to whether a similar notice was sent to any other customer, and it does not appear that the claimant Duel objected in any way to the terms of purchase.

It should also be noted that the particular certificate for 30 shares of Copper purchased for one Bamberger on October 25, 1912, was pledged on October 28, 1912, on his consent with the National Bank of Commerce, and that this very certificate received for Bamberger on October 28, 1912, was in the possession of the National Bank of Commerce at bankruptcy (Record, pp. 17, 22, 24).

On November 13, 1913, the date of the petition in bankruptcy, Hollins had in their possession or under their control, or loaned pursuant to agreement (Record, pp. 5, 6; see *Skiff* v. *Stoddard*, 63 Conn. 198, 209), 280 shares of Copper, the entire amount which they were obligated to carry for their customers (Record, pp. 17, 20, Table 37).

Bamberger's 30 shares were, as above noted, pledged to the National Bank of Commerce. 100 shares of Copper had been loaned to a customer, M. E. Hutchinson, on October 10, 1915, to carry

a "short" sale (Record, p. 20, Table 37); 100 shares were in Hollins' box, and 50 shares in the possession of the Kings County Trust Company.

We also desire to call the attention of the Court to certain transactions in Copper stock between October 28, 1913, the time when Landau purchased 100 shares of copper, and November 8, 1913.

On October 28th, one Ulrich, a customer of Hollins', purchased 100 shares of Copper, as did Landau.

On the same day one Schatzkin ordered Hollins to sell for his account 200 shares of copper "short", and this was done. It appears from the account (Record, p. 20, Table 37) that the certificates for the 200 shares so purchased for Landau and Ulrich on October 28, 1913, were delivered, upon receipt by Hollins & Co. to complete Schatzkin's "short" sale. On October 30, 1913, Ulrich sold his 100 shares, and Hollins borrowed 100 shares for the purpose of delivery to him. On October 31st Schatzkin ordered Hollins to "cover" his "short" sale, which was done by the purchase of 200 shares; 100 shares received as a result of this purchase on October 31st were placed in the "box", and 100 shares were returned to the broker from whom Hollins had borrowed a similar amount to make delivery to Ulrich on October 30, 1913. It is therefore apparent that the certificate in Hollins' "box" on October 31, 1913, represented the certificate originally purchased for Landau on October 28, 1913. That was the first time they ever had a certificate for those shares.

On November 3, 1913, 50 shares of Copper were taken from the "box" and hypothecated by Hollins with the Kings County Trust Company, and the certificate or certificates for those 50 shares were in

the possession of the said bank at bankruptcy (Record, p. 20; original, p. 37).

The 50 shares remaining in the "box", together with 50 shares which had been hypothecated on October 29, 1913, with the Hanover National Bank, were hypothecated on November 5, 1913, with Kuhn, Loeb & Co., where they remained until November 10, 1913 (Record, p. 20, Table 37).

On November 8, 1913 (a Saturday), Schatzkin again ordered Hollins to sell for his account 200 shares of Copper "short", and this was done. On the next business day, November 10th, Hollins was called upon to make delivery of certificates on this "short" sale, and turned over to the purchaser the certificates for 100 shares of Copper hypothecated with Kuhn, Loeb & Co. on November 5, 1913, and 100 shares additional which they had borrowed for that purpose.

On the same day Schatzkin ordered his brokers to "cover" the "short" sale, which they did by buying 200 shares "on the market".

As a result of this last transaction the 100 shares which had been borrowed were returned to the lender, and Hollins received 100 shares in a different certificate from another brokerage house on November 11th. This certificate for 100 shares was in the possession of Hollins at bankruptcy in their "box", and is the one in which appellants claim an interest (Record, pp. 17 and 18).

It will be remembered that at all times subsequent to October 28, 1913, and up to and including the date of bankruptcy, the certificate for 30 shares of Copper was in the possession of the National Bank of Commerce. The certificate for 100 shares which had been loaned to Hutchinson to cover his "short" sale was out of the possession of Hollins

at all times after October 10, 1913, and that after November 3, 1913, and up to and including the date of bankruptcy, 50 shares of Copper were in the possession of the Kings County Trust Company. The remaining 100 shares, which is the stock claimed in this proceeding, had been twice loaned to Schatzkin to cover "short" sales, and was returned to Hollins on November 11, 1913. At all times after November 1st, 1913, Landau had no credit balance (Record, Table 38).

The appellants, respectively, claim that they are entitled to 5/14ths and 5/28ths of the 100 shares of Copper which had come into the possession of the Receiver, on the theory that all of the Copper stock in Hollins' possession or control should be regarded as so much grain in a bin, without any consideration of whether it was in their actual possession or not, and also without any consideration of the condition of the accounts between themselves and the other customers owning Copper, and Hollins, or whether certificates were allocated to particular customers.

At bankruptcy Duel was the owner of 100 shares of Copper valued at $7,012.50, and was indebted to Hollins in the sum of $3,333.21 (Record, p. 20, Table 41). Wiener was the owner of 500 shares of Southern Railway, 100 shares of St. Paul, 50 shares of Copper, and 50 shares of U. S. Steel. This stock was worth $26,956.25, but they were indebted to Hollins in the sum of $23,803.47 (Record, p. 20, Table 39). Bamberger was the owner of 30 shares of Copper and 100 shares of U. S. Steel Common, worth $7,678.78, and was indebted to Hollins in the sum of $7,457.20 (Record, p. 20, Table 40). Landau was the owner of 50 shares of Steel Common and 100 Amalgamated Copper, valued at

$9,800, and owed Hollins $10,175.92 (Record, p. 20, Table 38).

In other words, it appears that if all the securities held for these customers at bankruptcy had been liquidated as of their value at that date, Landau would have been indebted to Hollins & Co. in the sum of $375.92; Wiener, Levy & Co. would have been a creditor in the sum of $3,152.78, Bamberger a creditor in the sum of $221.55, and Duel a creditor in the sum of $3,679.29.

We respectfully contend that we are not bound by the conclusions contained in the affidavit of Allaire (Record, p. 16) who was a mere employee, as to Hollins' alleged intent in acquiring or disposing of stock, or by the statements therein contained which are italicized in appellant Duel's brief (Appellant Duel's Brief, pp. 10 and 11). So far as the affidavit contains extracts from the books of Hollins & Co., it is of course binding, and its accuracy is unquestioned. We particularly refer to the portions of the affidavit in which it is stated that the 100 shares of Copper delivered on November 10, 1913, in consummation of the "short" sale, was "then held for the account of their long customers" (Record, p. 18). This statement is clearly a conclusion, and does not purport to be based on any entries in Hollins' books, and there is nothing in the record to show that it is anything more than the opinion of Allaire, which was incorporated in an affidavit prepared either by the Receiver or by the claimants (Record, p. 25).

Both appellants alleged that Hollins at bankruptcy did not have any certificates representing shares of Copper stock separately and specifically carried for their accounts (Duel Petition, Pars.

Fifth and Sixth, Record, p. 3; Wiener Answer, Par. Fifth, Record, p. 11), but the Receiver in his answer alleged that he did not have information sufficient to form a belief as to how the shares of Amalgamated Copper Co. were carried by Hollins', *i. e.*, whether they were carried for the joint and proportionate benefit of certain customers or not (Record, p. 9).

The appellants offered no proof in support of these allegations, but relied solely on "presumptions based on inferences."

POINT I.

A marginal customer of a stockbroker who seeks to reclaim stock after bankruptcy must identify affirmatively the certificates allotted to him, or prove that no certificates were specifically set aside for him, and all doubt must be resolved in favor of the Receiver. The decision in Gorman v. Littlefield, 229 U. S. 19, is not applicable to the facts in the case at bar.

In the District Court (*in re Hollins*, 212 Fed. Rep. 317) (Record, p. 21), Judge Hough was evidently under a misapprehension as to certain of the facts.

He had written the opinion for the District Court in the Gorman case, which was reversed by this Court, and evidently thought that that decision

was broader in its scope than it actually is and could be applied to any state of facts however dissimilar. In the first place he said that on November 7, 1913, the books of Hollins & Co. showed them as responsible for 280 shares of Copper; that

> "they had in possession only 100 shares, Bamberger's 30 shares were, as above noted, pledged to the National Bank of Commerce; but for which particular customer the 100 shares were held does not appear and cannot be ascertained. It follows that Hollins had apparently *already converted 150 shares* (100 shares 'in box', 30 shares with the National Bank of Commerce by Bamberger's consent, leaving 150 shares missing)." (Italics ours.) (Record, p. 22.)

As a matter of fact, the "converted" 150 shares were all in the possession or control of Hollins on November 7, 1913 (Record, p. 20, Table 37), 50 shares were in the possession of the Kings County Trust Company, where they had been pledged on November 3, 1913, and 100 shares were in the possession of Kuhn, Loeb & Co., having been delivered to them on November 3, 1913. The court continued:

> "On the day of the failure, the bankrupts continued to be liable as above noted for 280 shares of the stock in question, but they had in possession no more than the 100 shares now in the Receiver's hands, the certificates for which had come to them two days before as the result of the Schatzkin speculation" (Record, p. 22).

It would appear as if the District Court regarded the fact that the 180 additional shares were not in the possession of Hollins as an act of wrongdoing on their part, but as it appears that 80 shares had been rehypothecated by them with the Kings

County Trust Company and the National Bank of Commerce (See Matter of Ennis, 187 Fed. Rep. 720, 723), and that 100 shares had been loaned to a customer to cover a "short" sale (63 Conn. 198, 209, Record p. 6), there can be no question that they were wholly within their rights, and that they had in their possession or under their control at the filing of the petition shares sufficient to respond to the demands of all their customers (Appellant Duel's Brief, pp. 8 and 9; Wiener's Brief, p. 5).

The District Judge then attempted to apply the doctrines laid down by this Court in *Gorman* v. *Littlefield,* 229 U. S. 19; *Richardson* v. *Shaw,* 209 U. S. 365; and *Sexton* v. *Kessler,* 225 U. S. 90, to the facts in the case at bar as found by him, holding that these cases had made it unnecessary for a claimant to put his finger on the identical certificates purchased for him because it will be presumed that if a broker disposes of the certificates originally purchased for a customer, but has in his possession or under his control certificates for the whole number of shares necessary to meet his obligations, he intended when he acquired the new certificates to substitute them for the original certificates sold by him. The court, referring to *Gorman* v. *Littlefield* (*supra*), said:

> "It is true that Day, *J.* twice refers to the presence of shares sufficient to satisfy the demand of the petitioner Gorman—as if that fact were significant. It was significant, after the fictional presumption had been made, that what the brokers had on hand was acquired because they intended to replace the misappropriated shares of Gorman. If they were going to replace any shares, acquiring the exact amount taken is quite significant of intent to make good the wrong done. But if by dwelling upon number of shares on hand anything more than this was meant, the logical sym-

metry of the fictions on which the decisions rest is seriously impaired—to say the least.

If stock purchasers dealing in a given stock at a given broker's are entitled to regard his aggregate purchases as so much grain in a bin (at least until he allots the stock in specie, if there is such a thing); and if they are entitled to presume that when he wrongfully takes from the bin, any subsequent acquisition of 'stock grain' is intended to fill up the bin again; what difference can it make that, when the broker is surprised by bankruptcy the bin is full, or half full, or as here, 10-28 full?" (Record, pp. 23 and 24).

The difficulty is that we do not dispute that proposition, and it is not in accordance with the facts as found by the Circuit Court of Appeals.

It will at once be apparent to this Court that the learned Judge overlooked the fact that the bin was not "10-28 full," but that there were four bins containing 280 shares of Copper and no distinction is sought to be drawn between this case and the Gorman case on that ground. We ask appellants to prove which bin or bins their shares went in to.

All parties concede that Hollins & Co. had completely fulfilled their obligations and that they had in their possession or under their control a sufficient number of shares of Copper to answer the call of all their customers (Appellant Duel's Brief, pp. 8 and 9; Wiener's Brief, p. 5); but the Gorman case is distinguishable on several other distinct and separate grounds.

The above concession also eliminates any question as to the presumption of right-doing on the part of the broker. As it is admitted that the brokers fulfilled their obligations, it is not claimed that there was any wrong doing, and we feel aggrieved at the language of the learned Court below, apparently due to a misapprehension of the facts

in regard to alleged misdoings by the alleged bankrupts, and we call the attention of this Court to the following sentence from the opinion:

> "This right is helped out by that 'presumption in favor of fair dealing' so much dwelt on in the higher courts, though said presumption is productive of cynic smiles even in counsel advancing the same in courts nearer real life—as it is seen in stockbrokers' shops" (Record, p. 23).

It would seem as if our case had been gravely prejudiced in the District Court by this mistaken view of the District Judge as to the facts, and it is for that reason alone that we have taken the liberty of calling this sentence from the opinion to the attention of this Court.

The Court below understood that there was no claim of conversion by Hollins (Record, p. 36). We believe that our position is one of highest equity; that the alleged bankrupts have acted throughout the transaction honestly and in good faith and have fulfilled all their contract obligations, and in asking the affirmance of the decree of the Circuit Court of Appeals we believe that we are seeking a just and equitable result which does not in any way infringe upon the rights of the claimants, while protecting the equal rights and equities of the general creditors.

We only ask the appellants to prove that no certificates were specifically allotted to them and that Hollins' intended to hold all the Copper stock for the joint benefit of all customers owning it, or to point out the certificates which were not allotted to anyone. They are relying on inferences based on presumptions without any affirmative evidence. The opinion in this case in the Circuit Court of Appeals (*in re Hollins & Co.*, 219 Fed. Rep.

544 Record, p. 36) was written by Lacombe, *C. J.*, and was concurred in by Circuit Judges Coxe and Ward. The court below determined that this court did not intend by its decision in the Gorman case to relax the long established rule placing the burden of proof in a reclamation proceeding upon the claimant and requiring a customer claiming title to specific securities to reasonably identify the same as their property. The Court said (Record, p. 37):

> "Unless reasonably specific proof of such identification is presented, equity would seem to require that the fund for general creditors should not be depleted on any theory which has not the sanction of controlling authority."
>
> "The application of the theory followed in this case leads to this curious result. Bamberger was owing money to the bankrupts on his original purchase; his contract with them authorized them to pledge the stock bought for him. Shortly after purchase, a year before bankruptcy, the bankrupts borrowed money from the Bank of Commerce pledging his certificate for 30 shares as security. There it remained undisturbed till bankruptcy. The identity of this certificate as Bamberger's is conclusively proved; every one concedes that his 30 shares are represented by the certificate for that amount held by the bank. Nevertheless, under the theory now contended for, 30/280 of his 30 shares is also identified as a fractional part of another certificate for 100 shares; to that extent, 30/280, there would be a double identification.
>
> We are not satisfied that the decision of the Supreme Court requires the adoption of a method of identification, which may lead to such results. The statement is made that the court held in the Gorman case that: 'No identification is necessary—the presumption of restitution plus the physical presence of

some stock supplies the link in the absence of countervailing proof'.

But the facts in that case differed in a very material particular from those here presented. The bankrupt brokers in the Gorman case had bought for him 250 shares of Greene Cananea Copper, they had disposed of his original certificate, but other certificates had from time to time found their way into the box, so that when they failed they held 350 shares of that stock and were under obligations to no other customer to account for any such shares. Upon the presumption that the brokers, in the absence of proof to the contrary, did their duty, buying other shares of like kind to replace the customers, shares which they had sold, *identification of 250 shares, which belonged to Gorman, was made out*—the bankrupts had 350 shares free from any claim except Gorman's to 250 of them. The Supreme Court says: 'It is said, however, that the shares in this particular case are not so identified as to come under the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an *amount greater than* * * * should have been on hand for this customer' and the *significant fact* is shown that *no other customer claimed any right* in those shares of stock' (Italics, Circuit Court of Appeals).

* * * * * *

"The rights of general creditors are likely to be seriously impaired if the theory of constructive identification based on presumptions of intent be carried to the extent here asked for". (Italics ours.)

Appellants' whole case rests on the presumption that when Hollins' acquired the 100 share certificate on November 11, 1913, they intended to hold it as the joint property of all their "long" cus-

tomers. There is nothing to rest this presumption on.

The Gorman case may be distinguished in other ways. In the first place, it appears that all the Greene Cananea Copper stock was in Brown & Company's "box". It does not appear that any stock of this kind had been hypothecated or loaned. In addition, it appears from the Master's report in that case (Record, U. S. Supreme Ct., p. 83) that "the stock was bought on the understanding that it was to be paid for in full. The order was executed—stock left subject to the claimant's order". *In other words, Gorman was not a marginal customer at all.* He had bought and paid for 250 shares of Greene Cananea Copper stock. No one else had bought any stock of this kind from the bankrupts. It was the same as if he had deposited certificates with them. At bankruptcy they had in their "box" certificates for 350 shares of this stock. They had no lien whatsoever thereon, and the only possible theory upon which he could have been deprived of the right to 250 of the 350 shares was, that Brown & Co. had deliberately stolen his stock and bought similar stock for their own account. (*In re McIntyre & Co., ex parte Pippey,* 181 Fed. Rep. 955.) In such a case the presumption in favor of fair dealing was necessarily applied in order to prevent an affirmative wrong. The general creditors could not possibly have had any interest in the stock because it had been bought and paid for wholly with Gorman's money. No creditor would be injured by the return of the stock to Gorman, and if it was not returned to him, Brown & Company's assets would be unjustly enriched. The court therefore held that it must be conclusively presumed that Brown & Company had intended to

set aside 250 of the 350 shares for Gorman, and applied the principle that equity will presume that to have been done which ought to have been done. So far from altering the rule which has heretofore been uniformly enforced, we believe that the Gorman decision tended to strengthen the rule. The most that can be said is that this court intended to say that a claimant to shares of stock need not put his finger on the specific certificate acquired at the time he purchased stock, so long as he could identify certificates which the bankrupts must be presumed to have intended to substitute for those originally acquired for him. This was not a new rule, nor is there any indication of an intention to relax the rule requiring reasonable identification and placing the burden of proof on claimant.

In this case a further presumption must be made, if the claimants are to prevail, namely, that Hollins' did not allocate any certificates to particular customers. That is a presumption of wrongdoing, as we shall show hereafter.

Former Judge George C. Holt, of the District Court of the United States for the Southern District of New York, in a report as Special Master of that Court, *In the Matter of S. H. P. Pell & Co.,* dated May 27, 1915 (unreported), which was confirmed by Augustus Hand, *D. J.,* without opinion, said (p. 11):

> "I have required each claimant to show that either the certificate in question was set aside by the bankrupt as his property, was registered in his name, was the identical certificate purchased for him or delivered by him, *or was directly traceable to one of these classes of certificates* (Thomas *v.* Taggart, 209 U. S. 385; *in re* McIntyre, 24 A. B. R. 4, 36, 626-631; Gorman *v.* Littlefield, 229 U. S. 19;

Schuyler *v.* Littlefield, 232 U. S. 707; Matter of Jamison, 209 Fed. 541; *in re* Hollins, 212 Fed. 317; *in re* Hollins, 219 Fed. 544).

"Some confusion apparently has arisen in applying the decision in Gorman *v.* Littlefield (*supra*). Referee Dexter, in the Hollins report filed May 11, 1915, says: 'The most recent decisions seem to distinguish the revolutionary decision in Gorman *v.* Littlefield, qualifying the rule of positive identification of converted securities which prevailed prior thereto in this circuit'. And in Matter of Hollins, 219 Fed. 544, the Circuit Court of Appeals has held that the rule there set forth is only to be applied where the facts are identical with the Gorman case. In that case the Supreme Court directed the delivery to Gorman of certain shares of stock which could not be identified, but there the bankrupt brokers had in their box at the time of their failure enough stock to satisfy the demand of all claimants. The rule of the Supreme Court was apparently based upon the theory that a presumption existed where the broker, after conversion of a customer's stock, had subsequently purchased enough stock of the same kind to replace the conversion, that he had done what he ought to have done and had repurchased the stock for the account of the customer. Judge Hough, in one of the Hollins decisions, applied this principle where there was not enough of the stock to satisfy the demands of customers, by apportioning the stock on hand among the claimants. The decision upon this point was reversed by the Circuit Court of Appeals apparently upon the reasoning that the presumption did not exist where there was not a complete restitution. Judge Learned Hand, in a Circuit Court of Appeals decision, by way of dicta, has said that the principle of Gorman *v.* Littlefield can only be applied to securities in "box" and not to those in loans (Matter of Leavitt and Grant, 215 Fed. Rep. 902). *If*

> *Gorman* v. *Littlefield ever abrogated the so-called 'rule' in the McIntyre case, which required a positive identification of securities and forbade identification by elimination, it seems to me that the later decisions have so construed it that the rule has been substantially revived.* I have not applied the rule in Gorman *v.* Littlefield in any case where the securities were in loans at the time of the bankruptcy, and where the securities were in the bankrupt's possession I have only applied it where there were sufficient securities on hand to satisfy the demands of all the claimants. I have also followed what I regard as the established rule, that where the claimant seeks to charge the equity in the hands of the Receiver after the payment of a general loan with the lien of his claim, he must trace his property into the fund. Upon him rests the burden of proof, and if he is unable to identify his property as part of the fund, he must fail, and all doubt must be resolved in favor of the Trustee (See Schuyler *v.* Littlefield, *supra*). Each loan is to be regarded as a separate fund, even where there were two loans at the same bank (*in re* Jamison, 209 Fed. Rep. 541)". (Italics ours.)

We believe this is an accurate statement of the law, although the Court has misapprehended the reasoning of the Circuit Court of Appeals in this case.

The rule in the McIntyre case is set forth *In re McIntyre,* 181 Fed. 960. In that case, bankrupts bought 200 shares of a certain stock for a customer. They did not keep this stock, but used it as they would their own in the general transaction of their business. When they failed there were 95 shares of this stock in the Bank of Commerce loan, 10 shares were pledged in another loan, and 2 shares were in their vaults. They owed their customers

1,651 shares of this variety of stock. The court said (p. 962):

> "We also concur in the conclusion of the District Judge that persons whose stock has been used by a bankrupt for his own purposes cannot establish title to specific certificates of stock, found after bankruptcy as collateral to some loan, *unless they identify those certificates as representing the shares which the bankrupt took from the claimant.*" (Italics ours.)

An application for a writ of *certiorari* to review the last mentioned decision was made to this court and denied, *sub-nom. Grace* v. *Burlingham*, 218 U. S. 672.

The same proposition was urged in *Matter of Ennis*, 187 Fed. 728. In that case, claimant contended that he was the owner of 18 shares of Tennessee Coal & Iron stock, which was deposited with bankrupts before their failure, and which he claimed to follow into the proceeds of stock embraced in the pledge to the Mechanics Bank. Other Tennessee Coal & Iron shares had been pledged by the bankrupts to the National Reserve Bank. The claimant contended that he was entitled to avail himself of the doctrine of following trust funds, and the court said:

> "It is well settled in the application of that doctrine that *some measure of identification is necessary.* All that a claimant can follow into a bankrupt's estate and recover from its Trustee, are funds which he is able to trace into the estate. As this court said in the very recent case of Matter of McIntyre & Co., 185 Fed. Rep. 96; decided February 14, 1911: 'While the doctrine of following trust funds has been much extended in modern decisions, there has never been a departure in the federal

courts from the principle that there must be some identification of the property sought to be charged with the trust funds.'" (Italics ours.)

The court proceeded to say that the most that could be said in favor of appellant was that there were in the hands of the trustee more than enough of the kind of securities claimed by him to cover his demand and that no other person claimed them; and concluded (p. 730):

> "The appellant has undoubtedly a valid demand against the bankrupt's estate, but he fails to follow and identify either trust funds or particular certificates."

See also:

City Bank v. *Blackmore*, 75 Fed. 771.
Board of Commissioners v. *Strawn*, 157 Fed. 49.
In re Berry & Co., 149 Fed. 176; aff'd *sub-nom. Thomas* v. *Taggart*, 209 U. S. 385.
In re Berry, 147 Fed. 208.
In re Brown, 189 Fed. 432.
In re Brown, 193 Fed. 24; aff'd *sub-nom. First Nat. Bank* v. *Littlefield*, 226 U. S. 110.
In re Brown, 175 Fed. 769.
In re Brown, 193 Fed. 30; aff'd *sub-nom. Schuyler* v. *Littlefield*, 232 U. S. 707.
Knauth v. *Lovell*, 212 Fed. 337.

In *National City Bank* v. *Hotchkiss*, 231 U. S. 50, at page 58, this Court said:

> "In both Gorman *v.* Littlefield, 229 U. S. 19, and Richardson *v.* Shaw, 209 U. S. 365, in addition to the personality of the holder, there

> was also a specific stock which identified the fund relied upon and separated it from the general mass of the estate."

In the case at bar there were four separate funds and the burden of proof is upon the appellants to show, into which fund their shares went.

In *Matter of Brown ex parte Schuyler* (193 Fed. Rep. 32), affirmed *sub. nom. Schuyler* v. *Littlefield* (232 U. S. 707), Judge Lacombe said:

> "He cannot trace his money by a mere succession of presumptions. Some of the modern cases have gone very far—possibly in some instances too far—in the helping out of a claimant by presumptions not always reasonable; but in this circuit we have always required some substantive proof as a basis for holding that the owner of trust funds converted by a bankrupt has a lien on some particular part of the bankrupt's property".

Mr. Justice Lamar wrote the opinion of this Court in *Schuyler* v. *Littlefield, supra.* In that case, *Gorman* v. *Littlefield, supra,* was cited on behalf of the appellant, but this Court affirmed the decision of the Circuit Court of Appeals. In the course of his opinion, Justice Lamar said (p. 713):

> "Like all other persons similarly situated, they were under the burden of proving their title. If they were unable to carry the burden of identifying the fund as representing the proceeds of their Interborough stock their claim must fail. *If their evidence left the matter of identification in doubt the doubt must be resolved in favor of the trustee who represents all of the creditors of Brown and Company, some of whom appear to have suffered in the same way*". (Italics ours.)

In another case decided by the Circuit Court of Appeals for the Second Circuit on the same day in the same matter, *In re Brown* (193 Fed. Rep. 24), affirmed *sub nom. First Nat. Bank* v. *Littlefield* (226 U. S. 110), Judge Lacombe said (p. 29):

> "No doubt the individual whose property has been converted has a high equity and is entitled to certain well-settled presumptions; but we cannot assent to the proposition that he may trace his money into any specific fund or security merely by inferences based upon presumptions without substantive testimony to sustain them. *The burden of proof is on the claimant at the outset; it rests upon him at the close of the case. If he has not, then, upon the whole proof, made clear the final resting place of his converted property or its substitute, he cannot sustain his claim.*" (Italics ours.)

In the latest case in this Court, *Scotten* v. *Littlefield* (235 U. S. 407), decided on December 14, 1914, it was claimed that this Court had changed its rulings in regard to reclamation proceedings by its decision in *Gorman* v. *Littlefield, supra.* The Court said (p. 411):

> "If the decision in the *Gorman Case* would have required a different result if the principles upon which it was decided had been applied in the original proceeding, *which we do not find it necessary to decide,* such subsequent decision will not lay the foundation for a bill of review for errors of law apparent, or for new matter *in pais* discovered since the decree and probably requiring a different result". (Italics ours.)

The question at bar is accordingly an open one and has never been decided in this Court.

In *Macy* v. *Roedenbeck,* decided by the Circuit Court of Appeals for the Eight Circuit in September, 1915 (227 Fed. Rep., p. 346), the Court said (p. 353):

> "The modern and more equitable doctrine permits the recovery of a trust fund from one not an innocent purchaser, and into any shape into which it may have been transmuted, *provided he can establish the fact that it is his property or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished.*
>
> "This more recent doctrine follows the rule announced *In re Hallet's Estate* (*Knatchbull* v. *Hallett,* 13 Ch. Div. 696), which is to the effect that, if money held by one in a fiduciary character has been paid by him to his account at his bank, the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds in the bank, and afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that if he destroyed the trust fund by dissipating it altogether, there remains nothing to be the subject of the trust; *that only so long as the trust property can be traced and followed into other property into which it has been converted, does it remain subject to the trust".*

And in that case the Court cited *Schuyler* v. *Littlefield, supra;* and said (at page 355):

> "In *Gorman* v. *Littlefield* (229 U. S. 197, the Court simply affirmed the rule of law theretofore announced in *Richardson* v. *Shaw* (209 U. S. 365), with reference to the ownership of shares of stock of the kind theretofore purchased by the bankrupt for the claimant, and

> paid for, found in the possession of the bankrupt at the time of the filing of the petition, and to which claim had been made by no other person, the time for making such claim having expired, and the Court thereby recognized that: 'such shares were unlike distinct articles of property, differing in kind or value' ".

It is stated by the appellant Duel in his brief that it is not the custom or practice of brokers to allocate to customers certificates purchased for them on margin (Appellant's Brief, p. 18); but this statement is wholly without support, for there is not an iota of proof in the record of any such custom among brokers, nor is there any proof of the alleged fact stated in the appellant Duel's Brief on the same page that a Clearing House system has been established by the New York and other Stock Exchanges and that it has, therefore, become impossible for a broker, in the majority of cases, to identify and set aside for each "long" customer a particular certificate. Not only is there no proof of such a custom or method, but if such a system exists, it is a violation of a penal law of the State of New York, as we shall see.

To sum up a stock broker's marginal customer can not establish title to specific certificates for shares of stock found in the broker's possession at bankruptcy unless he can identify those certificates as representing the certificates deposited by him or acquired by the bankrupt for him.

POINT II.

The decisions of this Court are in accord with the ruling of the Circuit Court of Appeals.

There are three cases relied upon by appellants for the proposition that a customer has only a *pro rata* interest with all other customers entitled to that kind of stock in all the certificates of a certain kind of stock carried by his broker.

It is true that the courts have spoken of stock as having no earmark to distinguish one share from another, and have said that it is like grain—of a uniform quality—that one bushel is of the same kind and value as another, but the questions at issue in the cases in which this language was used were very different from those presented by the case at bar. In every case of customers tracing securities identification of particular certificates has been required, as we have seen.

In *Richardson* v. *Shaw* (209 U. S. 365), the bankrupt was a stock broker and the respondents were customers having a marginal account with him. The transactions extended over a period commencing February 10, and ending June 26, 1903. The customers deposited certain securities as margins in the place of cash. The broker was never left with a margin less than 10 per cent., and had at times a margin rising to 23½ per cent. According to agreement securities carried in the account were deposited to secure the same, and could be and were rehypothecated by the broker. On June 25th the broker was insolvent and had been so for the preceding two months, and the customer demanded

a final settlement. On June 26th securities to the value of $45,583.75 were turned over by the broker to his customer and the account was finally closed. None of the certificates of stock which the broker delivered to the customer at that time were the identical certificates that he had delivered to the broker. A month later the broker made a general assignment and was adjudicated a bankrupt within four months thereafter. The trustee brought a suit to set aside the transfer, above mentioned, on the ground that it was a preference, his theory being that the relationship between the broker and his customer was that of debtor and creditor. In a very lucid opinion Mr. Justice Day came to the conclusion that the relationship between the broker and his customer was that of pledgor and pledgee; that title to the stock was in the pledgee, and that he was accordingly entitled to recover his securities upon payment of his debit balance and that this was not a preference.

The occasion for the use of the language which we have mentioned above relative to the nature of stock certificates was the contention made by the trustee that the customer had not recovered the specific certificates deposited by him with the broker, and the Court held that this was immaterial. *The point was that the broker substituted certain certificates for those deposited.*

No one can possibly quarrel with this decision or doubt the soundness of its logic.

In *Sexton* v. *Kessler* (225 U. S. 90), the bankrupt had in its possession certain securities deposited as collateral for a loan by a foreign firm, and it had the right to withdraw and substitute other securities for those in its possession. This right was claimed to be inconsistent with title to

the securities pledged in the foreign firm. The Court said:

> "But the decisions of that court and of New York agree that there may be title in a stronger case than this.
>
> "When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes, yet as he is bound to keep stock enough to satisfy his contracts, * * * the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference (*Richardson* v. *Shaw,* 209 U. S. 365)".

In *National City Bank* vs. *Hotchkiss* (231 U. S. 50), the Court said:

> "In dealing with transactions of this kind we may go far in giving them any form that will carry out the mutually understood intent. But if the intent was doubtful or inconsistent with the legal effect of dominant facts, it must fail. * * * In both *Gorman* vs. *Littlefield,* 229 U. S. 19, and *Richardson* vs. *Shaw,* 209 U. S. 365, in addition to the personality of the holder there was also a specific stock, which identified the fund relied upon and separated it from the general mass of the estate."

As we have seen in the former case the broker must have intended to substitute the certificates found for Gorman and no one else. In the latter case he actually did substitute certificates.

We can find no basis in these cases for the assumption that the Supreme Court intended to depart form the rule which it has laid down over and over again, namely: that a customer is only entitled to the certificate of stock purchased for him if he can find it, or the certificate substituted for it.

In *Thomas* vs. *Taggart* (209 U. S. 385), which was argued at the same time as Richardson *vs.* Shaw (*supra*) and decided on the same day, the Supreme Court held that a claimant who had deposited certificates for 83 shares of United States Steel Preferred, one certificate for 33 shares and one for 50 shares, the certificate numbers being given, which certificates were returned to the trustees after the bankruptcy, was entitled to reclaim those particular certificates, and the Court held, in effect, that the claimant had title to the certificates. Mr. Justice Day said:

> "The certificates were returned to the trustees, who had no better right in them than the bankrupt.
>
> The rule is generally recognized that if the *title* to property claimed is good as against the bankrupt and his creditors at the time the trustee's title accrued, the title does not pass and the property should be restored to its true owner; or, if the property has been sold, the proceeds of the sale takes the place of the property." (Italics are ours.)

In that case, as in the Gorman case, the stock had been paid for in full.

In the case at bar Bamberger's certificate had not been sold and we do not see how anyone else can claim any title thereto, yet Judge Hough has in effect held that Bamberger had only a 3/28ths undivided interest in that particular certificate which was fully identified. Duell and Wiener's, have failed to show what became of the certificates ac-

quired or purchased for them but merely argue that all the certificates in the possession of Hollins & Co., or under their control, at the time of their failure, including Bamberger's 30 share certificate, must have been intended to be substituted for their own certificates previously disposed of. This amounts to the substitution of an elaborate system of guesswork for legal evidence and we do not believe that it will be countenanced by this court.

In the *Matter of McIntyre & Co., ex parte Pippey* (181 Fed. Rep. 955), a customer had deposited a certain certificate with McIntyre & Co. on March 14, 1908, as security against loss. This certificate was pledged by McIntyre & Co. and afterwards came into the possession of the trustee. The Court said:

> "Pippey's title to his stock is absolute. He is entitled to the certificate which represents that title."

POINT III.

It is wrongful for a broker to mingle certificates for shares of a certain kind of stock belonging to two or more marginal customers with varying debit balances, and to rehypothecate them without regard to the varying amounts he is advancing on them to each customer, and the Court will not presume such wrongdoing on the broker's part.

Certain hypothetical cases are suggested by the appellant Duel in asking for the reversal of the decision of the Court of Appeals (appellant Duel's

Brief, pp. 22, 23). In both instances we admit that the doctrine of the *Gorman* case would apply. In other words, as we understand it, the *Gorman* case would be applicable in all of the following instances:

If a broker at bankruptcy had in his possession stock of any particular kind and was obligated to carry the same number of shares for one or more customers who had paid for the stock in full or who had deposited it with him for safekeeping or otherwise, and was not in any way indebted to him, the customer could reclaim stock after bankruptcy without identifying any particular certificates. In other words, if one customer had deposited 50 shares of Copper and another had purchased 50 shares of Copper and paid for it in full, and there was one certificate in the broker's "box" at bankruptcy for 100 shares of copper, each customer would be entitled to a certificate or certificates for 50 shares of Copper stock without regard to the particular certificates which had been deposited with the broker before bankruptcy.

Again, if, in the instance supposed, the broker only had a certificate or certificates for 50 shares of Copper in his "box" after bankruptcy, the customers in question would be entitled upon their consent to share *pro rata* therein, unless the 50 shares so remaining in his possession were in the name of one or the other of the customers and so identified that it appeared that he had not intended to retain the 50 shares in question for the joint benefit of those particular customers.

But the "grain-in-a-bin" theory does not and cannot apply to the facts in the case at bar because the grain was not in a bin but in four bins. As we have seen, 100 shares of Copper was in the possession of the alleged bankrupts. One hundred shares had

been loaned to a customer. Fifty shares was in the possession of the Kings County Trust Company and 30 shares was held by the Bank of Commerce. It is true that the broker had not retained the particular certificates originally acquired for his four customers but he had in his possession or under his control at bankruptcy certificates for an equivalent number of shares.

In addition, the accounts between the four customers and the alleged bankrupts were all different. *None of the customers had paid for their stock in full.* The appellant Wiener had borrowed over $23,000 on securities with a market value at bankruptcy of $26,000. His equity in all of the securities was accordingly only about $3,000. His equity in each share of stock was 3/26ths of its value. The balance of the purchase price of the securities was part of the assets of the alleged bankrupts and the only fund applicable to the payment of the creditors. In a similar manner Duel had borrowed $3,300 on 100 shares of Copper, which was worth $7,012.50 (Record, Table 41). His equity in the Copper stock was accordingly only about 50 per cent. Bamberger had title to 30 shares of Copper, but he was indebted to Hollins in the sum of $7,457.20, and the total value of the securities held for him was $7,678.75; so that his equity was $221.55 (Record, Table 40); whereas, Landau was indebted to Hollins in the sum of $10,175.92, and his securities were only worth $9,800; so that he had no equity at all in the Copper stock but was indebted over and above the total value of the securities held for him in the sum of $375.92 (Record, Table 38).

In the *Gorman* case, as we have seen, the stock had been paid for in full and the creditors had no interest in the securities whatsoever. Mr. Justice

Day, writing the opinion for this Court, laid particular emphasis on that feature of the case when he said (p. 25):

> "Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in these certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt".

Of course in the *Gorman* case the general creditors had no interest in the stocks sought to be reclaimed. The contention of the trustee there was that the broker purchased certain securities for *Gorman* which were paid for in full; that thereafter the broker sold these securities without authority and in effect stole them; that thereafter he acquired new certificates for shares of the same kind of stock which remained in his possession at bankruptcy and that those certificates should be turned over to the trustee for the benefit of the general creditors because *Gorman* was unable to prove that when the brokers purchased the new certificates they intended to substitute them for those which they had originally stolen from him. It is no wonder that this Court reversed the decision of the Circuit Court of Appeals awarding the securities to the trustee on this state of facts. The new certificates were in effect bought with the proceeds of Gorman's stock.

In the case at bar, however, as we have seen, no question has been raised as to the rightfulness of the re-hypothecation of 80 shares of Copper with the Kings County Trust Company and the Bank

of Commerce. One hundred shares had been loaned to a customer to cover a "short" sale. It appears from the record that the appellant Duel, who owned 100 shares of Copper, had specifically authorized Hollins to loan all securities carried in his marginal account or deposits to protect the same without notice (Record, p. 6); so that Duel at least cannot complain of the lending of 100 shares of Copper, the exact amount claimed by him. The remaining 100 shares was in the possession of the alleged bankrupts at petition filed. It may very well be that the 100 shares loaned was Duel's property.

We do not claim that the broker was compelled to retain in his possession the particular certificates acquired from time to time pursuant to the orders of his customers and concede that, had he been called upon at any time before petition filed to deliver any of those securities, he could have turned over any of the certificates in his possession indiscriminately and without regard to whether they were the certificates originally acquired for that particular customer or not. And these two propositions are the only questions decided by this Court in *Richardson* v. *Shaw* (209 U. S. 365) and *Sexton* v. *Kessler* (225 U. S. 90), relied on by the appellants. What we do say is that, when a broker holds a certain number of shares of stock as pledgee for customers having marginal accounts, he cannot, in the absence of a specific agreement, borrow more on the shares of stock held for each customer than he is loaning thereon.

Douglas v. *Carpenter*, 17 N. Y. App. Div. 329, at p. 333;

Markham v. *Jaudon*, 41 N. Y. 235;

Skiff v. *Stoddard*, 63 Conn. 198; 26 Atl. Rep. 874; 28 Atl. Rep. 104;

Chapter 500 of the Laws of the State of New York, 1913, in effect May 14, 1913; New York Penal Law, Section 956; *Lawrance* v. *Maxwell*, 53 N. Y. 19.

This does not in any way affect the general ruling that each share of stock is like every other share of stock or any of the principles laid down by this Court in the cases hereinabove cited.

But we respectfully submit that this Court cannot presume either that Hollins borrowed more on any of the Copper stock than he was lending thereon or that the customers had authorized him to do so. If there was no such authorization, they would have been guilty of larceny had they borrowed more on their securities than they were lending, and this Court has said that the presumption is in favor of right-doing rather than wrong-doing The burden was accordingly upon the claimants to show either that Hollins wrongfully hypothecated the Copper stock for more than he was lending thereon, or that each of his customers had authorized him in writing to do so. It is true that the appellant Duel had authorized Hollins to borrow more on his 100 shares of copper than he was lending, but there is no evidence of any such agreement with any of the other owners of copper stock.

It is very evident that any different rule might impose very serious hardships. As we have seen, Landau, who had title to 100 shares of Copper stock, owed more to Hollins than the entire value of all the securities they were carrying for him. In his case, therefore, they would have been justified in re-hypothecating his securities for anything they could get on them from the banks. Duel had paid about 50 per cent. of the purchase price

of his securities and Hollins would not have been justified in borrowing more than 50 per cent. of their value by way of re-hypothecation. Under such circumstances, an honest broker, if he re-hypothecated Duel's securities at all, would place them in a loan which was safely margined so that he would have no difficulty in redeeming them upon receipt from Duel of the balance of the purchase price; and also so that, in the event of his failure, Duel could easily obtain them from the bank with which they had been re-hypothecated upon serving notice of his claim of title. See *In re McIntyre & Co. ex parte Pippey* (181 Fed. Rep. 955).

It is true that Duel had authorized Hollins to re-hypothecate his securities for more than they were lending on them, but we are of course merely using his case by way of illustration.

The rule contended for by the appellants would be of the greatest advantage to the customer with the smallest margin and a great hardship to a customer who had paid for his stock practically in full; for, according to the theory contended for, all stock of any particular kind in the possession or control of a broker belongs *pro rata* to all the customers who have purchased stock of that kind from him on margin, and presumably the broker can re-hypothecate it for the joint debt of all such customers.

Thus, it appears in the case of Bamberger that, on October 25, 1912, nearly a year before the bankruptcy, he had ordered Hollins to buy for his account 30 shares of stock of the Amalgamated Copper Company and that a purchase was made on the New York Stock Exchange from H. Content and Company, and that on the same day the seller of

the stock "asked for a name for transfer", which, in the language of the Stock Exchange, means that they wished to notify Hollins that they were prepared to deliver 30 shares of stock by transfer at the Transfer Office of the Company. Thereupon, Hollins gave their own name to the seller and paid the agreed price. Content and Company delivered Certificate Number 13,702 for 30 shares of the Amalgamated Copper Company's stock to Hollins on October 28, 1912. That particular certificate was pledged with the consent of Bamberger with the Bank of Commerce on October 30, 1912, and was re-pledged on various renewals of the loan made by the bank and was still held by the Bank of Commerce at the time of the failure of Hollins on November 13, 1913 (Record, p. 17).

Despite these facts, the appellants say that Bamberger did not own this certificate but only had a 30/280ths interest in it and they claim that they together own 150/280ths thereof and logically it follows that Bamberger owned 30/280ths of the 100 shares of Copper stock loaned by Hollins on October 10, 1913, to a customer to carry a "short" sale. There is no evidence that Hollins could rightfully lend his stock. It appears that the Bank of Commerce loan was liquidated and a surplus, after the payment of the claim of the Bank, came into the possession of the Receiver (Record, pp. 2, 3).

It is true that Bamberger's credit balance only amounted to $221.55, but he certainly had title to that 30 shares of Copper, and it might have been possible for him to recover that amount from the Bank of Commerce surplus, unless he owned but 30/280ths thereof.

But it is claimed that, even if the 30 shares in question were identified, the claimants to the remaining 250 shares of Copper stock are entitled to

their *pro rata* in the 100 shares in the possession of the Receiver (Appellant Wiener's Brief, p. 23).

There is no more logic in this contention than there was in the original one unless the appellants prove affirmatively that the brokers did not allocate particular certificates for particular customers and they have failed utterly to meet the burden of proof in this regard. It is true that Allaire said that "the certificate in question was held for Hollins' long customers" (Record, p. 18); but this statement, in addition to being a conclusion, does not help the appellants in any way because he does not say whether it was held for all of the long customers or one or more of them; and, as we have seen, it could not have been held for Bamberger, who was a "long customer". He also said that it was the practice of Hollins and Company to use certificates of stock on hand in making deliveries indiscriminately and without regard to particular certificates or certificate numbers and that there were never any certificates for Amalgamated Copper stock standing in the name of any customers (Record, p. 19).

But that is entirely aside from the question in the case at bar. We do not claim that Hollins was obliged to deliver any particular certificates to customers. What we say is that Hollins was obliged to refrain from borrowing more money on the shares belonging to each particular customer than they were lending thereon and, in order to do so, he necessarily allocated certain certificates for particular customers or that, if he did not do so, the burden of proof was upon the appellants to show it, and they have failed to meet this burden. The appellants say (Appellant Duel's Brief, p. 32):

> "To require customers to identify particular certificates purchased for them under modern

> practice, would result in denying them their property rights in the majority of cases. * * * It would be juggling with words to say that the customers are the owners of the shares purchased for them unless they were held to be 'equitable tenants in common of all the stock of that kind in the broker's hands' ".
>
> (Appellant Wiener's Brief, p. 30):
>
> "Our broad position * * * was that we had nothing to do with tracing certificates or trust funds."

If this be true, a marginal customer never acquires the right to the possession of any particular certificate until it actually comes into his possession. As was said by Hough, *J.*, in the District Court (Record, p. 23):

> "Putting together these controlling fictions, it is difficult to see what exclusive right any customer can have in any given certificate until he gets it in possession".

In other words, if John Smith purchases 100 shares of Copper stock from a broker, paying 90 per cent. of the purchase price and has it transferred into his own name, indorsing it in blank, and the stock is re-hypothecated by the broker for the 10 per cent. of the value thereof, loaned thereon, and the broker thereafter fails, Smith could not reclaim that particular certificate if there were other customers who owned stock in the same corporation held by the same broker, but would only be entitled to a *pro rata* interest with the other customers in the shares of stock represented by that certificate. In the absence of a specific agreement with each customer, we cannot believe that this is the law or that this Court intended by its decision in the *Gorman* case to promulgate such a rule.

POINT IV.

A stock broker in the absence of special agreement is bound to allot specific certificates to each customer upon disposing of those acquired for, or received from him and will be presumed to have done so in the absence of substantive evidence to the contrary.

If presumptions of fair dealing are to be indulged in, we must assume that brokers comply with the positive requirements of statutes.

Chapter 500, Laws N. Y., 1913, in effect May 14, 1913, N. Y. Penal Law, Section 956, provides:

> "§ 956. Hypothecation of customer's securities. 1. A person engaged in the business of purchasing and selling as a broker stocks, bonds or other evidences of debt of corporations, companies or associations, who, * * *
>
> 2. Having in his possession stocks, bonds or other evidences of debt of a corporation, company or association belonging to a customer on which he has a lien for indebtedness due to him by the customer,
>
> Pledges the same for more than the amount due him thereon, or otherwise disposes thereof for his own benefit without the customer's consent, and without having in his possession or under his control, stock, bonds or other evidences of debt of the kind and amount to which the customer is then entitled, for delivery to him upon his demand therefor and tender of the amount due thereon, * * * is guilty of a felony."

How can anyone comply with this statute unless he keeps separate certificates for each customer?

How could an easier method of avoiding the effect of this statute be devised than for a broker to substitute new certificates for all those purchased, and then treat them as the joint property of all customers instead of alloting them.

Suppose ten customers each purchased 10 shares of stock of a market value of $100 per share or $10,000.

Suppose five customers paid $200 each and five $100 each, or a total of $1,500, and the broker advanced $8,500. Suppose he sold the certificates received and acquired new ones. Regarding the new certificates as the joint property of all, he could pledge each 10 share certificate in a different loan for $850, the average indebtedness.

Suppose a customer who had paid $200 tendered his balance.

How could the broker obtain any certificate without making an advance? Would this not be a violation of the terms of the statute and of the Common Law?

See *Douglas* v. *Carpenter,* 17 N. Y. App. Div. 329-333.

Lawrance v. *Maxwell,* 53 N. Y. 19, 23.

The certificates must obviously be allotted.

When a customer gives an order to a broker for the purchase of stock at a certain price and is notified that the requisite number of shares have been purchased, the broker is obliged to acquire a certificate or certificates for the requisite number of shares of stock (Law N. Y., 1913, Ch. 236. In effect April 9, 1913, N. Y. Penal Law, 3390). If the transaction is a marginal one the broker may retain the certificates in his possesion but the customer has a right to demand the possession

thereof at any time upon paying his debit balance and he has title thereto throughout.

Markham v. *Jaudon,* 41 N. Y. 235.

It is true that the broker would not have to deliver the exact certificates so acquired, for the reasons fully discussed in *Richardson* vs. *Shaw* (*supra*), but that is because the broker has the right to substitute other certificates of the same issue for those acquired or purchased for the customer. This act of substitution must be an actual affirmative act, and unless the broker intends to substitute certain other certificates for those so acquired or purchased, title to the original certificates remains in the customer until disposed of. If the broker disposes of the original certificates and fails to substitute another it is larceny (*Matter of McIntyre ex parte Pippey,* 181 Fed. Rep. 955), provided that he has not other certificates sufficient to satisfy all the claims of all the customers entitled to that issue on a different agreement; and we will admit that if he does dispose of the original certificates and he has in his possession or under his control certificates for a sufficient number of shares to satisfy the claims of all his customers, the assumption is tenable that he did not intend to sell these customers' securities, but to substitute certain other certificates for those disposed of. But until he does substitute other certificates for those disposed of, by an affirmative act, no one customer can assert title to any particular certificate as against another. He must prove which certificate was substituted for his.

Schuyler vs. *Littlefield* (232 U. S. p. 717).

As long as the broker has a block of unassigned certificates in his possession equal in amount to the number of shares which he is obligated to carry for

his customers he is within the law. But it seems absurd from a practical standpoint to say that each customer has an interest in each certificate in his possession or under his control to the extent that the number of shares of stock which he owns bears to the total number of shares of that stock for which the broker is responsible, and that that must be presumed to have been the broker's intention.

On November 11 Hollins' acquired a certificate for 100 shares of Copper, and the whole basis of Judge Hough's decision is the assumption that when they acquired this particular certificate for 100 shares of Amalgamated Copper they intended to acquire the same for the *joint benefit of all of their "long" customers.* There is no evidence that the certificates delivered out on November 10 were held for the joint benefit of all their "long customers.

Such an assumption is contrary to the experience of practical business men, and the Court should not read into such a transaction a meaning which the actors therein never dreamt of.

Where is the evidence that the broker intended to substitute the present certificates for the certificates originally acquired or purchased for the claimant? The burden is on claimant to show how the certificates were allotted.

If Hollins' had only had 180 shares of Copper in his possession or control would it be assumed that they had converted the joint property of all the customers owning Copper to that extent particularly in view of the fact that Landau, who owned 100 shares of Copper, had more than exhausted his margin?

A certificate must be delivered in consummation of a sale of corporate stock (N. Y. Pers. Prop. Law § 162; Law 1913, Chap. 600. In effect Sept. 1,

1913) in order to transfer title to it or to the shares represented by it. Without it or proof that it has been lost, or destroyed, a seller cannot make a delivery (N. Y. Pers. Prop. Law, § 178, Chap. 600, Laws N. Y. 1913. In effect Sept. 1, 1913). It is, of course, perfectly true that shares of stock have no ear-marks—that one share cannot be distinguished from another—but it is equally true that it is only the certificates which are distinguishable one from the other by their numbers, and in other ways (see *Hubbell* v. *Drexel,* 11 Fed. Rep. 115).

As was said in an English case (Ind's Case, L. R., 7 Ch. App., 485, 1872):

> "The numbers of shares are simply directory for the purposes of enabling the title of particular persons to be traced."

It is true that every share of stock is worth the same as every other share of stock of the same kind at any given time, but before an owner can transfer title to his shares he must produce a certificate therefore (N. Y. Pers. Prop. Law, § 162).

It is, therefore, vital that an owner be able to identify some particular certificate as representing his shares of stock, and he can only do so by certificate number and without it in his possession he is, although still the owner thereof, without power in the ordinary case to sell it. It is customary when a broker purchases securities for a customer, for him to receive a particular certificate or certificates of stock. Until these certificates are sold or disposed of by the broker, they belong to the customer.

Thomas v. *Taggart,* 209 U. S. 385.

In re McIntyre ex parte Pippey, 181 Fed. Rep. 955.

In re McIntyre & Co., 24 Am. B. Reps. 1—13—40.

If a broker does sell this certificate he is bound to substitute some other certificate therefor, but until he does so by some affirmative act there is nothing for the owner to claim.

When a broker hypothecates a certificate which represents a certain number of shares of stock, that number of shares of stock becomes a part of the collateral for a particular loan to the broker. He pledges it to carry some particular customer.

Simpson v. *Jersey City,* 165 N. Y., 193.

If the pledgee of that certificate calls his loan and sells the collateral, he must deliver the certificate in question. The sum received therefor will be the market value of the number of shares of that particular stock at the particular time of sale, which in most instances is different from the market value at any other time. If the broker fails and the owner of the certificate afterwards brings reclamation proceedings, he cannot receive more than the market value of the said shares of stock at the time of the sale of the certificate by the broker.

Board of Commissioners v. *Strawn,* 157 Fed. Rep. 49.

City Bank v. *Blackmore,* 75 Fed. Rep. 771, 773.

A broker might pledge a certificate for one hundred shares of stock purchased for a customer, A, who had paid 99% of the purchase price thereof, in a loan in which the collateral was worth 150% of the amount loaned. He might pledge a certificate for 100 shares of stock bought on a 5% margin for another customer, B, in which the value of the collateral barely equalled the amount of the loan. Yet upon the broker's insolvency, adopting the

theory of the decision appealed from, A and B would each have a 50% undivided interest in the proceeds of each certificate. Upon the liquidation of the first loan, B could pay his debit balance to the broker and reclaim fifty shares of stock or its proceeds, thus making himself in effect a preferred creditor, when his particular certificate had as a matter of fact, been sold in satisfaction of the second loan, collateral for which did not realize enough to pay the loan. The burden would be on the Receiver to prove a different intent by the broker, and it is not certain that that would defeat B's claim.

These difficulties all arise out of the rule which declares that purchasers of securities on credit obtain title thereto, and that the relationship of a customer with his broker is that of pledgor and pledgee, and not of debtor and creditor. This rule is too well settled to be altered, but it is equally well settled that a claimant to property in a Receiver's possession must identify certain property as his, and that not by presumptions and inferences.

The claimant's proposition is that all certificates are the joint property of all customers.

If this be true, and a broker converts a certificate of stock of a kind he is bound to carry for two or more marginal customers, will he be presumed to be stealing the joint property of all such customers, even though it is the very certificate purchased for a customer traceable by number?

POINT V.

The stock sought to be reclaimed in this proceeding has been shown to be the property of Landau to the extent of 50 shares, by positive identification, and any general identification must yield thereto.

As we have seen, Hollins' was obligated to carry for various customers at bankruptcy 280 shares of Copper.

They had in their possession 100 shares, 30 shares had been pledged to the National Bank of Commerce, 50 shares to the Kings County Trust Company, and 100 shares had been loaned to a customer, M. R. Hutchinson (Record, Table 37). Bamberger owned 30 shares, Duel 100 shares, Wieners' 50 shares, Landau 50 shares.

(*a*) As to the 30 shares in the Bank of Commerce.

The proof is positive and definite that Hollins' purchased 30 shares of Copper for Bamberger on October 25, 1912, and received certificate Number 13,702. This very certificate was pledged with the National Bank of Commerce and was in its possession at bankruptcy. It has, therefore, been positively identified, and Bamberger has title thereto, and as he did not own more than 30 shares of Copper he cannot have title or any interest in the 100 shares which was in the possession of Hollins', nor can any one else have any interest in his certificate.

(*b*) As to the 50 shares in the Kings County Trust Company.

On October 28, 1913, Hollins' purchased 100 shares of Copper on the order of Landau. This stock was loaned on the same day to one Schatzkin, together with another 100 shares purchased for one Ulrich. On October 30th, Ulrich sold his stock and Hollins' borrowed 100 shares of Copper in order to be able to make a delivery. On October 31, Schatzkin returned the 200 shares of Copper borrowed by him, and Hollins' retained 100 shares and delivered the other 100 shares to the concern from which they had borrowed 100 shares on October 30th.

The 100 shares of Copper so received was placed in Hollins' "box."

On November 3, 1913, Hollins' hypothecated 50 of this 100 shares with the Kings County Trust Company, retaining the other 50 shares in its vault; and this 50 shares was in the Kings County Trust Company at bankruptcy (Record, Table 37). It is, therefore, apparent that the 50 shares in the Kings County Trust Company was the property of Landau, being the precise stock substituted for the stock acquired for Landau on October 28, 1913. Landau, accordingly, owns the said 50 shares and no one else has any interest therein, nor can Landau claim any interest in the 100 shares in the possession of the Receiver except to the extent of 50 shares.

(*c*) As to the 100 shares in the possession of the Receiver.

On November 4, 1913, Hollins' hypothecated the 50 shares in its vault with Kuhn, Loeb & Company together with another 50 shares which had pre-

viously been hypothecated by them with the Hanover National Bank (Record, p. 17, Table 37).

On November 10, 1913, Schatzkin again sold 200 shares of Copper short. Hollins' delivered the 100 shares of Copper which it had placed with Kuhn, Loeb & Company and borrowed an additional 100 shares.

On November 11, 1913, Schatzkin again covered his short sale and Hollins' received the certificate for 100 shares of Copper which was in its vault at bankruptcy and returned the 100 shares borrowed on November 10th. It is, therefore, evident that 50 of the 100 shares in the possession of the Receiver can be identified as the exact stock substituted for the stock purchased for Landau on October 28, 1913 (Record, Table 37).

Under these circumstances it is apparent that of the 100 shares in the possession of the Receiver, no one other than Landau can claim any interest in more than 50 shares.

Neither Bamberger nor Landau can claim any interest in the unidentified 50 shares, for Bamberger's 30 shares was in the Bank of Commerce, and Landau had 50 shares in the Kings County Trust Company and 50 shares in the Receiver's possession.

(*d*) As to the 100 shares which had been loaned for the benefit of a "short" customer.

Petitioner Duel was entitled to 100 shares of Copper and Wieners' to 50 shares; 50 shares remained in the possession of the Receiver unidentified, and Hutchinson owed Hollins' 100 shares which they had loaned him on October 10th, 1913, to carry a "short sale" (Record, p. 52). The record shows that Duel had agreed at the time of the purchase of the 100 shares for him (Oct. 1912) that Hollins' might loan it (Record, p. 6).

In *Skiff* v. *Stoddard* (63 Conn. 198, 225; 26 Atlantic Rep. 874) the customs of trade and rights of the parties to such transactions were discussed at great length. The Court said:

> "Privileges which Bunnell and Scranton enjoyed and the rights which they exercised over the stocks in their hands which are inconsistent with the ordinary privileges and rights of a pledgee, may be said to have been * * *.
>
> 3. That they occasionally, by reason of their short sales for other customers, reduced their carrying of certain stocks below the requirements of their customers."

It may be doubted whether a broker could loan stocks for this purpose in the absence of a specific agreement.

Douglas v. *Carpenter*, 17 N. Y. App. Div. 329, at p. 332.

As we have seen, Duel admits that he had such an agreement with Hollins', but it does not appear that any one else had agreed to this, and it would seem to us to be a tenable presumption that the stock delivered to Hutchinson on October 10, 1913, to cover a "short" sale was Duel's. But whether it was or not, it is apparent that neither Duel nor Wieners' can claim any interest in more than fifty of the shares in the possession of the Receiver.

In *Skiff* v. *Stoddard* (*supra*), the Court said (p. 225):

> "In cases like the present, where the pledged property is made up largely of stocks, the problem of identification becomes complicated, by reason of the right in the pledgee to

take out in his own name a new certificate and to preserve no separation of particular shares from other like shares held by the pledgee. A strict identification of precise shares is thus oftentimes rendered impossible. Nevertheless, both in law, and in fact, shares are being held in pledge. Evidently the rule which demands identification as a prerequisite to repossession must when such conditions are encountered, receive such reasonable construction and application as will, upon one hand, satisfy the purpose of the rule, and, upon the other hand, do justice to the parties. *It will not do to dispense with the necessity of identification. Neither will it do to suffer a permissible practice on the part of the pledgee to deprive a pledgor of his property.*

If we look at the conditions which the claims of the several plaintiffs present, we find that nearly every possible contingency exists. These may be classified as follows:

(1) Where it can be shown that the precise certificates of stock, or evidence of title originally purchased in the execution of a plaintiff's order, were held for him by Bunnell and Scranton at the time of their assignment. (2) Where it appears that certain particular certificates of stock or evidences of title were by them being carried in fulfilment of a plaintiff's order, although it may be impossible to establish that such certificates or evidences of title were the precise ones originally purchased in the execution of that order.

* * * * *

Classes 1 and 2 present no difficulty. The plaintiffs making such identification are clearly entitled to redeem. *This identification being a strict one of precise property, it, of course, follows that it must take precedence of any general identification* such as remains to be considered, and gives to the fortunate pledgor the first right to that which is so identified." (Italics are ours.)

The above case, decided by a 3-2 vote, most clearly approaches the doctrine accepted by Judge Hough, but it professes to acquire some identification, whereas he has decided that identification is unnecessary, and that all claimants are in the same class. For a precise exposition of our views we refer the Court to Judge Torrance's dissenting opinion in *Skiff* v. *Stoddard* on the very point suggested by appellant's counsel.

Skiff v. *Stoddard*, 63 Conn., p. 232, 28 Atl. Rep., p. 104.

He says:

"TORRANCE, *J.*: I agree with the majority of the court in holding, as follows:

1st. That the contract in question when carried out according to its terms and as contemplated by the parties resulted in the relation of pledgor and pledgee between Bunnell & Scranton and the plaintiffs, as to all stock purchased for the plaintiffs under and according to the contract.

2d. That upon the facts found by the committee any original stock in fact so purchased for any customer might be repledged by Bunnell & Scranton for their own debt.

3d. That upon such facts also such original stock might be sold or otherwise finally disposed of by Bunnell & Scranton for their own purposes at any time, provided that at or before such sale or final disposition they actually and in fact substituted for such original stock an equal number of shares of the same kind of stock.

4th. That a like disposition might be made by Bunnell & Scranton of any such substituted stock upon a like substitution at or before such disposition, and so on *ad infinitum*.

5th. That such stock actually substituted by Bunnell & Scranton for the stock so disposed of, immediately on such substitution and sale being made, became the property of the customer, subject to the pledge.

6th. That in all instances where any of the plaintiffs can show that either the original stock purchased for them according to the contract, or that which was substituted for it in the aforesaid manner, was in the possession of Bunnell & Scranton or their agents or pledgees at the time of the assignment, such plaintiffs are entitled to redeem their property.

To this extent I agree with the majority opinion. With what that opinion seems to me to hold expressly or by implication upon certain other points I do not agree.

In the first place, it seems to hold that the broker may at any time sell the original stock purchased for a customer, without first actually substituting in place of it other like stock, and may afterwards, at any time before the termination of the contract, substitute after-acquired stock with equal effect for all concerned.

This seems to me to be inconsistent with the legal conception of a pledge. In cases where, prior to the sale of such pledged stock, other stock is in fact substituted, the parties may be regarded, upon such a state of facts as is found by the committee, as consenting to such sale and substitution, and thus in effect giving and receiving the substituted stock in pledge. But where no such substitution is made in fact the case is entirely different.

* * * * * *

It seems to me that in all cases of sale of the original stock by the broker for his own purposes, some unequivocal act of the broker manifesting and carrying out an intent to substitute other stock in place of that sold should be required, and where this cannot be shown to have been done before such sale, no lien of

pledge in favor of the customer attaches to the stock of the broker then on hand, and certainly not to any which he subsequently acquires.

* * * * * *

The mere fact that a broker, at and after a sale of the original stock, purchased for a customer, has and at all times retains in his possession or within his control sufficient stock of the kind sold to fill his customer's order at any time, and that he owned or controlled it in order to be ready to fill such order, will not of itself give the customer any property in such stock so held or controlled.

The majority opinion divides the plaintiffs into five classes with reference to their power or ability to identify their property. Classes one and two are I think entitled to redeem the property pledged. In those cases it is of necessity shown that the stock is either that which was originally purchased for the customer or that which had been in fact lawfully substituted for it. In regard to the other three classes, I think they are not entitled to redeem because the existence of a pledge is not shown."

And to Judge Carpenter's dissenting opinion, 63 Conn., page 245; 28 Atlantic Rep., page 106.

Under the *Skiff* v. *Stoddard* doctrine Duel and Wieners' could only share *pro rata* in the 50 shares not identified and in the Receiver's possession, and not in the 50 shares clearly traced as representing Landau's stock. But this rule has never been followed in *toto* by the federal courts, and as they have failed to identify particular certificates they can receive nothing. It is a mistake to suppose that this feature of the above case gets any authority from *Richardson* v. *Shaw, supra,* which cites it only on the general question of whether a broker's customer is an owner of stock or an obligee of a contract.

POINT VI.

The rule contended for will impair the rights of general creditors.

We call the attention of the Court to the grave injustice to the general creditors in the enforcement of the "grain-in-a-bin" theory to facts such as those disclosed in the record at bar. Claimants will be relieved from the necessity of identifying any stock but will be permitted to reclaim from a bankrupt's trustee all the securities of any kind which may come into his possession, charging their debit balances against stocks which are not recoverable. In many cases, upon the liquidation of their accounts, they would have been creditors of the bankrupt entitled to share *pro rata* in the general assets; but by paying their debit balances to the trustee, by charging them against stock which has been lost (Record, p. 25), and reclaiming securities of the kind they owned without identifying them, they will be paid in full, and the general creditors deprived to that extent of securities which were partly paid for with the general assets. As was said by Judge Hough *In re Hollins ex parte First National Bank* (unreported), June 2, 1915:

> "Though not personally in sympathy with the now lengthy list of decisions which have converted the bankruptcy of a stock broker into an elaborate system of priorities which leaves nothing for general creditors * * * I shall at all events follow the ruling of my own Court".

Where a customer is able to plainly identify securities as being his and to separate them from the

mass of securities, he is of course entitled to this preferential treatment upon payment of the proportion of his debit balance chargeable against the securities identified. But if all the customers are to be permitted to reclaim any securities which may be on hand, it is apparent that the secured creditors, namely, the banks, will be the only creditors who will be able to recover anything from the bankrupt's estate.

In most cases, when a broker makes a loan, he hypothecates securities to which he has title, purchased with funds of his general creditors, together with securities of his customers which he has been authorized to re-hypothecate. The lending bank after bankruptcy sells a sufficient number of the securities so hypothecated to satisfy its claim with interest in full and turns over the balance, if any, to the trustee. Under the rules for the marshaling of assets, it has been held that this surplus will be deemed to be the proceeds of the customers' securities; in other words, that equity will assume that all of the bankrupt's securities were applied in liquidation of the loan before recourse was had to any securities belonging to customers.

If customers are to be permitted to share in these surplus funds without being obliged to prove in which particular loan their stock was placed by the broker, it is apparent that the whole of every surplus so received by the trustee after the liquidation of a loan of this kind will have to be turned over to customers, and this in the face of the fact that a large proportion of the amount borrowed by the broker from the bank was obtained to carry the customer. For instance, in the case of a loan of $100,000, the broker may hypothecate securities

worth $60,000 which belonged to him, together with securities worth $60,000 of a kind which he was obligated to carry for various customers. He may have actually loaned the customers $50,000 on those particular securities. He may have used $50,000 of money borrowed from general creditors for the purchase of his own securities. Upon liquidation of the loan by the bank, the trustee will receive the balance of, say, $20,000. The customers will claim that they have paid $40,000 of the amount loaned to them by the sale of their securities; that the remaining $60,000 paid to the Trust Company was the proceeds of the bankrupt's securities and that they are therefore entitled to have turned over to them the whole surplus of $20,000. In other words, the general creditors will be deprived of their proportion of the surplus in question and the customers will be paid in full.

Of course, the customers must in some way obtain credit for the $10,000 still due from them to the brokers on the securities in question, but that is easily done. It will be found that the broker has hypothecated some of the same customers' securities with other banks (Record, p. 25), and that, after the liquidation of those loans, there was no surplus at all. The customer will therefore claim credit for that amount, which has of course been paid from the proceeds of his securities on the broker's debt to the Bank; but this does not in any way aid the general creditors who have been deprived of their rightful proportion of the surplus fund, the proceeds of the bankrupt's securities, and assets of the estate in the case supposed. The situation is best set forth in the opinion of Judge Prentice in *Skiff* v. *Stoddard* (63 Conn. 198; 26 Atl.

Rep. 874), in a decision which has become one of the leading authorities on the subject in this country. He said (at p. 230):

> "The plaintiffs had, in effect, loaned it (the broker), the use of their stocks to enable money to be raised to carry their enterprises. The general creditors had perchance loaned it money with which other stocks had been bought. We think that both classes of customers ought to accept the situation as they find it, and that the plaintiffs are not, under the circumstances, entitled to assert as their equitable right that which would necessarily result in giving them a priority over other creditors. The burden incident to the discharge of any pledge made by Bunnell & Scranton must, therefore, be averaged among all the stocks and securities held in such pledge".

If the last cited rule were applied in the Federal courts, there could be no complaints; but it is not; and it was held in *Matter of McIntyre and Company* (24 American Bankruptcy Reports, p. 4; 10 (Sec. 4), affirmed 181 Fed. Rep., p. 960) that all of the bankrupts' securities must be deemed to have been applied to the liquidation of a loan before recourse is had to any of the customers' securities, citing *Farwell* v. *The Importers' and Traders' Bank* (90 N. Y. 483).

This rule was re-affirmed by the Circuit Court of Appeals for the Second Circuit in *Matter of Hollins and Company ex parte First National Bank,* decided March 14, 1916 (unreported), despite the fact that the customers' securities had all been rightfully re-hypothecated. The net result accordingly is that, if the rules for the identification of securities are to be relaxed, the intent and purpose of the Bankruptcy Act will be wholly frustrated and the claimants in a stock-

broker's case will be divided into three classes: First, the secured creditors; second, marginal customers; third, general creditors. The first two classes of creditors will be paid in full and the general creditors will receive nothing.

POINT VII.

The rights of appellants were fixed at petition filed, and they can only recover the proportion of the value of the securities identified, which their total credit balance at that time bore to the market value of all their securities.

In the case at bar even if Duel & Wiener owned 5/14ths and 5/28ths respectively of the 100 shares of Copper in the Receiver's possession they must satisfy Hollins' lien at petition filed of 50% and 90% respectively on those shares of stock. They can only recover their *pro rata* number of the 100 shares upon payment of a *pro rata* proportion of their debit balance.

> *Matter of McIntyre & Co. ex parte Natl. Bank of Commerce,* 24 A. B. R. 4, 11, 12, 36.

It matters not that the balance of their stock is not recoverable. They cannot be allowed to apply the deficit in one loan against the surplus in another (*In re Jamison,* 209 Fed. Rep., p. 501). Their interest in the stock if they have identified it was fixed as of the date of Bankruptcy (*In re McIntyre,* 24 A. B. R. 4, 11 (9). Less

fortunate customers may find all their securities in "deficit loans" where they will have only general claims. So far as Appellant's securities are not recoverable, they will have a general claim for their equities at bankruptcy in those securities. Appellants claim a 5/14th and 5/28th interest respectively in the 100 shares of Copper which had been loaned, and in the 80 shares which had been hypothecated in the Kings County and Bank of Commerce loans.

In the first case it does not appear that the stock is recoverable or that Hollins' Estate will obtain its proceeds.

In the latter cases, the appellants may be able to recover their equity in those shares from the funds returned to the Receiver, by the Banks.

They must first show that their indebtedness to Hollins has been paid before they can recover here. Must Hollins' lose if the 100 shares loaned are not recovered?

POINT VIII.

The decree of the Circuit Court of Appeals should be affirmed.

Dated, New York, April 15, 1916.

Respectfully submitted,

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DUEL *v.* HOLLINS.

WIENER, LEVY & CO. *v.* HOLLINS.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Nos. 352, 353. Argued May 4, 5, 1916.—Decided June 5, 1916.

A bankrupt firm of brokers having, prior to bankruptcy carried on marginal transactions for several different customers in shares of stock of the same corporation amounting in the aggregate to more than the number of shares of that stock in their possession at the time of the bankruptcy, and none of such shares being identified as the particular shares carried for any of the respective customers, but all of whom demanded their full quota of shares and offered to pay the amount due thereon, *held* that:

Brokers and their customers stand in the relation of pledgee and pledgor.

In dealings between brokers and customers stock certificates issued by the same corporation lack individuality; they are, like receipts for coin, to be treated as indistinguishable tokens of actual values.

As between themselves, after paying the amount due the broker on a marginal transaction, the customer has a right to demand from the broker delivery of stock purchased for his account and such a delivery may be made during insolvency without creating a preference.

The fact that the bankrupt broker in this case did not have sufficient shares of stock of a corporation on hand at the time of his

bankruptcy to satisfy the demands of all of his customers entitled to shares of that particular stock *held* not to prevent such customers from obtaining any of such shares, and require that all of such shares go into the general estate, but *held* that all of such customers were entitled to such shares and on demanding the same and paying the amounts respectively due thereon, should participate *pro rata* in a division of the shares actually on hand.

219 Fed. Rep. 544, reversed and 212 Fed. Rep. 317, affirmed.

THE facts, which involve the relative rights of the trustee in bankruptcy of a firm of brokers and various customers entitled to shares of stocks carried on margin by such brokers, are stated in the opinion.

Mr. Frederick W. Longfellow, with whom *Mr. Lewis L. Delafield* was on the brief, for appellant in No. 352.

Mr. Stuart McNamara, with whom *Mr. Carl A. de Gersdorff* was on the brief, for appellants in No. 353.

Mr. William C. Armstrong, with whom *Mr. Charles K. Beekman* was on the brief, for appellees.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Hollins & Company, brokers and members of the New York Stock Exchange, went into bankruptcy November 13, 1913.

On October 13, 1912, they purchased for appellant Duel a hundred shares of Amalgamated Copper Company stock—"Copper"—and received certificates therefor which they subsequently disposed of by deliveries on account of sales for customers.

October 25, 1912, they purchased for one Bamberger thirty shares of "Copper," received a certificate therefor and pledged this for their own benefit with the National Bank of Commerce.

February 25, 1913, they purchased for appellants Wiener, Levy & Company fifty shares of "Copper" and received a certificate. About June 13, 1913, this passed out of their control "for and in behalf of another customer."

Prior to November 1, 1913, they were directed to purchase for one Landau a hundred shares of "Copper," and their books charge them as carrying this number for his account.

At the close of business November 7, 1913, they were responsible to customers for two hundred and eighty shares of "Copper"—Bamberger thirty, Duel one hundred, Wiener, Levy & Company fifty, Landau one hundred; and they held in actual possession—"in the box"—only two certificates for fifty shares each. November 10, 1913, they used these in making delivery on a short sale. On the same day that sale was "covered" and on November 11 they received and placed in their box a certificate (No. 29373) for one hundred shares.

When bankruptcy occurred (November 13) their entire liability to "long" customers on account of "Copper" arose from purchases of two hundred and eighty shares as above narrated; and they actually held only certificate No. 29373, received two days before. To secure their own loans they had on pledge with Kings County Trust Company and National Bank of Commerce, respectively, certificates for fifty and thirty shares; and they also had an outstanding short sale of one hundred shares.

In the deposition of Allaire, bankrupts' cashier, it is said:

"The said certificate No. 29373 was never marked or otherwise identified by Hollins & Co. as the property of any particular person or customer, or placed in any envelope bearing any indication that the said stock was held for the special account of any particular customer or

person, and no memorandum appears upon the books or records of Hollins & Co. to the effect that said stock was purchased or held for the special or particular account of any one customer or person.

. . .

"It was the practice of Hollins & Co. to use certificates of stock on hand in making deliveries thereof, indiscriminately and without regard to particular certificates or certificate numbers, excepting only cases where customers deposited certificates of stock standing in their own names as margin for their own accounts, where such certificates were usually retained in kind, but at no time from the 1st day of November, 1913, until and including the 13th day of November, 1913, were there any certificates for Amalgamated Copper stock standing in the name of any customers.

"Certificate No. 29373 representing 100 shares of Amalgamated Copper stock was not purchased or received for the account of any member of the firm of Hollins & Co., or for the personal account of said firm as a whole, but was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper stock due said firm on balance on said date."

The record indicates that all transactions in question were made in pursuance of the usual contracts for speculative purchases and sales of stock upon margins.

By timely petitions appellants claimed that in adjusting their accounts for final settlement with bankrupts' estate they were entitled to have allotted to them respectively 100/280 and 50/280 of the one hundred shares of "Copper" represented by certificate No. 29373. The District Court, Southern District of New York (212 Fed. Rep. 317), sustained their position and ordered accordingly, but the Circuit Court of Appeals reached a different conclusion and reversed the order. 219 Fed. Rep. 544.

The facts of the present case differ in some respects from those presented in *Gorman* v. *Littlefield*, 229 U. S. 19; but we think a logical application of principles there approved requires disagreement with the Circuit Court of Appeals and approval of order in the District Court.

In view of our former opinions it must be taken as settled: That bankrupts and their customer stood in the relation of pledgee and pledgor. That in their dealings stock certificates issued by same corporation lacked individuality and, like fac-simile storage receipts for gold coin, could properly be treated as indistinguishable tokens of identical values. That as between themselves, after paying amount due brokers, the customer had a right to demand delivery of stocks purchased for his account; and such delivery might have been made during insolvency without creating a preference. *Richardson* v. *Shaw*, 209 U. S. 365; *Thomas* v. *Taggart*, 209 U. S. 385; *Sexton* v. *Kessler*, 225 U. S. 90; *Gorman* v. *Littlefield*, 229 U. S. 19.

Summing up the doctrine of *Richardson* v. *Shaw* concerning legal relationship between customer and broker in buying and holding shares, we said in *Gorman* v. *Littlefield* (pp. 23–24): "It was held that the certificates of stock were not the property itself, but merely the evidence of it, and that a certificate for the same number of shares represented precisely the same kind and value of property as another certificate for a like number of shares in the same corporation; that the return of a different certificate or the substitution of one certificate for another made no material change in the property right of the customer; that such shares were unlike distinct articles of personal property, differing in kind or value, as a horse, wagon or harness, and that stock has no earmark which distinguishes one share from another, but is like grain of a uniform quality in an elevator, one bushel being of the same kind and value as another. It was therefore

concluded that the turning over of the certificates for the shares of stock belonging to the customer and held by the broker for him did not amount to a preferential transfer of the bankrupt's property."

And we there further declared (pp. 24–25): "It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. *Richardson* v. *Shaw, supra.* It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically purchased for the appellant, to buy others of like kind and to keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant. Furthermore, it was the right and duty of the broker, if he sold the certificates, to use his own funds to keep the amount good, and this he could do without depleting his estate to the detriment of other creditors who had no property rights in the certificates held for particular customers. No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightfully belonged to the bankrupt."

When the bankruptcy which occasioned *Gorman* v. *Littlefield* took place the broker's box contained certificates, not specifically allotted, for three hundred and fifty shares of the designated stock and the appellant's claim for two hundred and fifty was the only one presented by a customer. We held that under the circumstances no more definite identification was essential, and approved his contention. If in the instant cause a certificate for two hundred and eighty shares of "Copper" instead of one hundred had been on hand the four customers for whom that number were purchased might successfully claim them under rule approved in Gorman's case. And merely because the one actually in the box represented insufficient shares fully to satisfy all is not enough to prevent application of that rule so far as the circumstances will permit. The District Court properly awarded to appellants their *pro rata* parts of the one hundred shares.

Decree of Circuit Court of Appeals reversed, and decree of District Court affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE HUGHES, dissenting:

In *Gorman* v. *Littlefield*, 229 U. S. 19, the reasoning embodied in the following extract from the opinion (p. 24) was, as I take it, essential to vindicate the conclusion reached by the court: "It is said, however, that the shares in this particular case are not so identified as to come within the rule. But it does appear that at the time of bankruptcy certificates were found in the bankrupt's possession in an amount greater than those which should have been on hand for this customer, and the significant fact is shown that no other customer claimed any right in those shares of stock. It was, as we have seen, the duty of the broker, if he sold the shares specifically pur-

chased for the appellant, to buy others of like kind and keep on hand subject to the order of the customer certificates sufficient for the legitimate demands upon him. If he did this, the identification of particular certificates is unimportant."

In the present case, it does not appear that at the time of the inception of the bankruptcy proceedings certificates were found in the brokers' possession equal in amount to those which should have been on hand; several customers are laying claim to the shares that were on hand; and it affirmatively appears that the brokers, having sold the shares specifically purchased for these customers, had not bought others of like kind, nor kept on hand certificates sufficient for the claims of the customers upon them. Not only was no stock kept on hand to answer the claims aggregating 280 shares, but it affirmatively appears that the 100 shares that were on hand were not acquired with intent to make restitution. The deposition of Allaire, the only man having knowledge upon the subject, was that Certificate No. 29,373, representing 100 shares of Amalgamated Copper Stock, "was received from the Stock Exchange Clearing House in the usual course of business as representing the balance of Amalgamated Copper Stock due said firm on balance on said date"—the date being one unconnected with any transaction for account of the appellants or either of them.

It is one thing to infer an intent to make restitution to a customer when the acts have been done that are necessary to effect restitution; it is an entirely different matter to infer an intent to make restitution when no restitution has in fact been made. The presumption of an intent to restore fractional interests in this case must rest on the merest fiction; and such a fiction ought not to be indulged in cases of this character, where it will inevitably result in creating a series of arbitrary

preferences, contrary to the equity of the Bankruptcy Act.

I think the decree of the Circuit Court of Appeals (219 Fed. Rep. 544) ought to be affirmed, and am authorized to say that MR. JUSTICE HUGHES concurs in this dissent.